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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF MONTANA

FROM MAY 31, 1917, TO MAY 16, 1918

OFFICIAL REPORT

VOLUME 54

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
1918

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JUSTICES
OF
THE SUPREME COURT OF THE STATE OF MONTANA,
DURING THE TIME OF THESE REPORTS.

THE HON. THEO. BRANTLY, Chief Justice.
THE HON. SYDNEY SANNER,
THE HON. WILLIAM L. HOLLOWAY, } **Associate Justices.**

OFFICERS OF THE COURT:

S. CLARENCE FORD, Attorney General.
FRANK WOODY, Asst. Attorney General.
R. L. MITCHELL, Asst. Attorney General.
ALBERT A. GRORUD, Asst. Attorney General.
JAMES T. CARROLL, Clerk.
MARSHALL N. RACE, Marshal.
AUGUST C. SCHNEIDER, Court Stenographer.



ATTORNEYS AND COUNSELORS AT LAW.

Admitted from July 9, 1917, to June 17, 1918.

ABEL, ERNEST, December 24, 1917.

BAILEY, JANE, June 17, 1918.

BARLOW, FRANK A., November 19, 1917.

BENTZ CHRISTIAN, June 3, 1918.

BOURQUIN, GEORGE R., May 25, 1918.

BROWN, JOHN L., January 28, 1918.

BROWN, PHILIP S., December 3, 1917.

CHAPMAN, LAWRENCE, October 8, 1917.

CLARK, CHARLES L., December 10, 1917.

COFFEY, J. E., June 11, 1918.

COLES, CYNTHIA, March 25, 1918.

DANIELS, PHILIP X., June 11, 1918.

ELDERKIN, E. DAVENPORT, June 11, 1918.

EWERS, EDGAR, May 6, 1918.

FREEBOURN, HARRY J., June 11, 1918.

GANTTER, ARTHUR J., June 6, 1918.

GARRIGUS, MARY F., June 17, 1918.

GERYE, E. D., March 30, 1918.

GLOVER, ROY H., March 14, 1918.

GWIN, IRA A., October 22, 1917.

HICKEY, CHARLES T., June 10, 1918.

HIX, LESTER E., October 2, 1917.

JEFFERY, C. M., December 10, 1917.

KELLEY, JOHN C., June 11, 1918.

KING, DEAN, December 10, 1917.

KNUDSON, I. L., November 12, 1917.

KRAMER, ARNOLD O., October 2, 1917.

LAYTON, JACK, June 17, 1918.

LINDLEY, JOSEPH T., September 10, 1917.

LOEHL, DONALD, November 12, 1917.

MCCONNELL, H. F., December 10, 1917.

MCGOUGH, JOHN F., March 9, 1918.

McHUGH, R. E., April 22, 1918.

McKINNEY, J. HERBERT, January 14, 1918.

MALETTE, GEORGE A., October 8, 1917.

MARTIN, GRANT L., June 11, 1918.

MORRASY, F. WILBUR, November 5, 1917.

NELSTEAD, RUDOLPH, October 2, 1917.

NEWTON, HENRY R., November 19, 1917.

NOYES, C. W., January 11, 1918.

O'NEILL, CHARLES E., June 11, 1918.

PRESTBYE, E. C., June 17, 1918.

RANKIN, EDNA, June 17, 1918.

RAY, WILLIS E., December 10, 1917.

ROBERTS, CLARENCE H., September 10, 1917.

ROBINSON, VERNE E., November 26, 1917.

STEPHENS, FLORENCE W., November 5, 1917.

STREFF, J. N., December 10, 1917.

TEMPLETON, PAYNE, June 11, 1918.

THOMAS, MATHONIAH, December 3, 1917.

TRUSCOTT, WILLIAM, May 20, 1918.

VILK, JOSEPH P., June 11, 1918.

WALKUP, FRANK B., October 8, 1917.

DIRECTORY
OF THE
JUDICIAL DISTRICTS OF THE STATE OF MONTANA
1918

FIRST JUDICIAL DISTRICT.

County of Lewis and Clark. County Seat, Helena.
District Judges: Hon. R. Lee Word; Hon. W. H. Poorman.
Officers: County Attorney: Lester H. Loble, Esq.
Clerk of District Court: F. L. Reece.
Sheriff: Edward J. Majors.

SECOND JUDICIAL DISTRICT.

County of Silver Bow. County Seat, Butte.
District Judges: Hon. John V. Dwyer; Hon. J. J. Lynch; Hon.
Edwin M. Lamb.*
Officers: County Attorney: Jos. R. Jackson, Esq.
Clerk of District Court: Otis Lee.
Sheriff: Jno. K. O'Rourke.

THIRD JUDICIAL DISTRICT.

Counties of Deer Lodge, Powell and Granite.
District Judge: Hon. George B. Winston.
Officers of Deer Lodge County (County Seat, Anaconda):
County Attorney: David H. Morgan.
Clerk of District Court: James White.
Sheriff: L. L. Hartsell.

*Appointed June 1, 1918, to succeed Hon. J. B. McClernan, who died May 29, 1918.

Officers of Powell County (County Seat, Deer Lodge) :

County Attorney: W. E. Keeley, Esq.

Clerk of District Court: Robert Midtlyng.

Sheriff: Thos. Mullen.

Officers of Granite County (County Seat, Philipsburg) :

County Attorney: R. Lewis Brown, Esq.

Clerk of District Court: Wm. B. Calhoun.

Sheriff: Fred. C. Burks.

FOURTH JUDICIAL DISTRICT.

Counties of Mineral, Missoula, Ravalli and Sanders.

District Judges: Hon. A. L. Duncan; Hon. R. Lee McCulloch;
Hon. Theodore Lentz.

Officers of Mineral County (County Seat, Superior) :

County Attorney: Ivan E. Merrick, Esq.

Clerk of District Court: Blanche M. Hyde.

Sheriff: Chas. Hoffman.

Officers of Missoula County (County Seat, Missoula) :

County Attorney: Fred. R. Angevine, Esq.

Clerk of District Court: Harry M. Rawn.

Sheriff: J. T. Green.

Officers of Ravalli County (County Seat, Hamilton) :

County Attorney: E. C. Kurtz, Esq.

Clerk of District Court: J. T. Coughenour.

Sheriff: Ike Wylie.

Officers of Sanders County (County Seat, Thompson Falls) :

County Attorney: Wade R. Parks, Esq.

Clerk of District Court: Wm. Strom.

Sheriff: Joseph L. Hartman.

FIFTH JUDICIAL DISTRICT.

Counties of Beaverhead, Jefferson and Madison.

District Judges: Hon. Joseph C. Smith; Hon. W. A. Clark.

Officers of Beaverhead County (County Seat, Dillon):

County Attorney: Wilber G. Gilbert, Esq.

Clerk of District Court: Fred Rife.

Sheriff: C. K. Wyman.

Officers of Jefferson County (County Seat, Boulder):

County Attorney: J. E. Kelly, Esq.

Clerk of District Court: W. B. Hundley.

Sheriff: T. L. Locker.

Officers of Madison County (County Seat, Virginia City):

County Attorney: Geo. R. Allen, Esq.

Clerk of District Court: Matt Carey.

Sheriff: Clarence W. Hungerford.



SIXTH JUDICIAL DISTRICT.

Counties of Park, Stillwater and Sweet Grass.

District Judge: Hon. Albert P. Stark.

Officers of Park County (County Seat, Livingston):

County Attorney: E. M. Niles, Esq.

Clerk of District Court: W. H. Pethybridge.

Sheriff: A. S. Robertson.

Officers of Stillwater County (County Seat, Columbus):

County Attorney: B. E. Berg, Esq.

Clerk of District Court: G. B. Iverson.

Sheriff: Edward B. Fellows.

Officers of Sweet Grass County (County Seat, Big Timber):

County Attorney: John B. Selters, Esq.

Clerk of District Court: H. C. Pound.

Sheriff: H. G. Lyons.

JUDICIAL DISTRICTS OF THE

SEVENTH JUDICIAL DISTRICT.

Counties of Dawson, Richland and Wibaux.

District Judge: Hon. C. C. Hurley.

Officers of Dawson County (County Seat, Glendive):

County Attorney: Albert Anderson, Esq.

Clerk of District Court: Frank A. Parrett.

Sheriff: Geo. Twible, Jr.

Officers of Richland County (County Seat, Sidney):

County Attorney: Carl L. Brattin, Esq.

Clerk of District Court: Guy L. Rood.

Sheriff: Fred. D. Sullivan.

Officers of Wibaux County (County Seat, Wibaux):

County Attorney: E. F. Fisher, Esq.

Clerk of District Court: A. E. Jeffers.

Sheriff: J. W. Jones.

EIGHTH JUDICIAL DISTRICT.

Counties of Cascade, Teton, and Toole.

District Judges: Hon. Jere B. Leslie; Hon. Harry H. Ewing.

Officers of Cascade County (County Seat, Great Falls):

County Attorney: Geo. A. Judson, Esq.

Clerk of District Court: Geo. Harper.

Sheriff: Louis H. Kommers.

Officers of Teton County (County Seat, Chouteau):

County Attorney: George W. Magee, Esq.

Clerk of District Court: Paul Jacobson.

Sheriff: William Miller.

Officers of Toole County (County Seat, Shelby):

County Attorney: W. M. Black, Esq.

Clerk of District Court: Perry J. Day.

Sheriff: J. S. Alsup.

NINTH JUDICIAL DISTRICT.

County of Gallatin. County Seat, Bozeman.

District Judge: Hon. Ben. B. Law.

Officers: County Attorney: C. E. Carlson, Esq.

Clerk of District Court: W. L. Hays.

Sheriff: D. E. Gray.

TENTH JUDICIAL DISTRICT.

County of Fergus. County Seat, Lewistown.

District Judges: Hon. Roy E. Ayers, *Hon. H. L. De Kalb.

Officers: County Attorney: Stewart McConochie, Esq.

Clerk of District Court: James L. Martin.

Sheriff: John H. Stephens.

ELEVENTH JUDICIAL DISTRICT.

Counties of Flathead and Lincoln.

District Judge: Hon. T. A. Thompson.

Officers of Flathead County (County Seat, Kalispell):

County Attorney: T. H. MacDonald, Esq.

Clerk of District Court: R. N. Eaton.

Sheriff: J. H. Metcalf.

Officers of Lincoln County (County Seat, Libby):

County Attorney: Benjamin F. Maiden, Esq.

Clerk of District Court: Timothy Miller.

Sheriff: Waverly L. Brown.

*Appointed March 2, 1917, pursuant to provisions of Chapter 35, Laws of 1917. Resigned May 18, 1918. Successor not appointed at date of publication of this volume,—July 10, 1918.

***TWELFTH JUDICIAL DISTRICT.**

County of Chouteau.

District Judge: Hon. John W. Tattan.

Officers of Chouteau County (County Seat, Fort Benton):

County Attorney: J. A. Kavaney, Esq.

Clerk of District Court: Geo. D. Patterson.

Sheriff: K. B. Crawford.

THIRTEENTH JUDICIAL DISTRICT.

Counties of Carbon, Big Horn and Yellowstone.

District Judges: Hon. Chas. A. Taylor; Hon. A. C. Spencer.

Officers of Carbon County (County Seat, Red Lodge):

County Attorney: H. A. Simmons, Esq.

Clerk of District Court: G. L. Finley.

Sheriff: George Headington.

Officers of Big Horn County (County Seat, Hardin):

County Attorney: Franklin D. Tanner, Esq.

Clerk of District Court: Frank A. Nolan.

Sheriff: John H. Kifer.

Officers of Yellowstone County (County Seat, Billings):

County Attorney: Jas. L. Davis, Esq.

Clerk of District Court: Fred Inabnit.

Sheriff: S. W. Matlock.

FOURTEENTH JUDICIAL DISTRICT.

Counties of Meagher, Broadwater and Wheatland.

District Judge: Hon. John A. Matthews.

Officers of Meagher County (County Seat, White Sulphur Springs):

County Attorney: H. E. Hagerman, Esq.

Clerk of District Court: Geo. H. Bell.

Sheriff: Geo. B. Nagues.

*Counties of Blaine and Hill detached from Twelfth Judicial District for purpose of creating Eighteenth Judicial District. (Chap. 32, Laws 1917.)

Officers of Broadwater County (County Seat, Townsend):

County Attorney: Fred. W. Schmitz, Esq.

Clerk of District Court: Fred Bubser.

Sheriff: Harry A. Crittenden.

Officers of Wheatland County (County Seat, Harlowton):

County Attorney: L. D. Glenn, Esq.

Clerk of District Court: A. T. Anderson.

Sheriff: Dominic Grivetti.

FIFTEENTH JUDICIAL DISTRICT.

Counties of Rosebud and Musselshell.

*District Judge: Hon. Geo. P. Jones.

Officers of Rosebud County (County Seat, Forsyth):

County Attorney: Donald Campbell.

Clerk of District Court: D. J. Muri.

Sheriff: Henry Grierson.

Officers of Musselshell County (County Seat, Roundup):

County Attorney: W. W. Mercer, Esq.

Clerk of District Court: W. G. Jarrett.

Sheriff: Chas. C. Hopkins.

SIXTEENTH JUDICIAL DISTRICT.

Counties of Custer, Fallon, Prairie and Carter.

District Judge: Hon. Daniel L. O'Hern.

Officers of Custer County (County Seat, Miles City):

County Attorney: Frank Hunter, Esq.

Clerk of District Court: C. A. Lindeberg.

Sheriff: Austin B. Middleton.

Officers of Fallon County (County Seat, Baker):

County Attorney: Chas. J. Dousman, Esq.

Clerk of District Court: Ralph Keener.

Sheriff: M. E. Jones.

*Appointed March 26, 1918, vice Chas. L. Crum, impeached March 22, 1918.

Officers of Prairie County (County Seat, Terry) :

County Attorney: Joseph C. Tope, Esq.

Clerk of District Court: W. A. Cameron.

Sheriff: W. A. Johnson.

Officers of Carter County (County Seat, Ekalaka) :

County Attorney: L. L. Wheeler, Esq.

Clerk of District Court; L. J. O'Grady.

Sheriff: Geo. S. Boggs.

SEVENTEENTH JUDICIAL DISTRICT.**Counties of Phillips, Valley and Sheridan.**

District Judge: Hon. John Hurly.

Officers of Phillips County (County Seat, Malta) :

County Attorney: F. C. Gabriel, Esq.

Clerk of District Court: C. M. Porter.

Sheriff: J. R. Crabb.

Officers of Valley County (County Seat, Glasgow) :

County Attorney: Carl D. Borton, Esq.

Clerk of District Court: Oscar S. Cutting.

Sheriff: C. W. Powell.

Officers of Sheridan County (County Seat, Plentywood) :

County Attorney: L. J. Onstad, Esq.

Clerk of District Court: O. R. Girard.

Sheriff: Jack Bennett.

***EIGHTEENTH JUDICIAL DISTRICT.**

Counties of Blaine and Hill.

†District Judge: Hon. W. B. Rhoades.

Officers of Blaine County (County Seat, Chinook).

County Attorney: D. L. Blackstone, Esq.

Clerk of District Court: A. W. Ziebarth.

Sheriff: Jas. Buckley.

Officers of Hill County (County Seat, Havre).

County Attorney: V. R. Griggs, Esq.

Clerk of District Court: Geo. W. Glass.

Sheriff: Geo. Bickle.

***Created by Chapter 32, Laws of 1917.**

†Appointed March 5, 1917.

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SUPREME COURT RULES.

For the Rules of the Supreme Court of the State of Montana,
see 53 Mont. xxvii.

AMENDMENT.

It is ordered that Rule I, Subdivision B of the Rules of this court applicable to the Admission of Attorneys, be amended to read as follows:

B. FROM OTHER JURISDICTIONS.

1. **Who may be Admitted.** Every citizen of the United States, or person resident of this state who has *bona fide* declared his intention to become a citizen in the manner required by law, who has been admitted to practice law in the highest courts of another state or of a foreign country where the common law of England constitutes the basis of jurisprudence, and where the requirements for the admission are substantially equivalent to those of this state, or, if not, where the applicant has practiced successfully for at least two years immediately prior to his application, may be admitted to practice in the courts of this state upon the production of his license and satisfactory evidence of good moral character.

Promulgated February 25, 1918.

(xxxi)

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Promulgated February 25, 1918.

(xxi)

ERRATA.

On page 67, paragraph 3 of syllabus, line 3, insert word "not" after word "were."

On page 142, line 4 from top, read, "when the logs were marked, scaled and removed," *etc.*, for "when the logs were marked, sealed," *etc.*

On page 336, line 2 of paragraph 4 of syllabus, read "laws of nature" for "law of nature."

(xxxii)

CASES DETERMINED
IN THE
SUPREME COURT

AT THE
JUNE TERM, 1917.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. SYDNEY SANNER,
THE HON. WILLIAM L. HOLLOWAY, } **Associate Justices.**

**PADDEN, RESPONDENT, v. MURGITTROYD ET AL., APPEL-
LANTS.**

(No. 3,776.)

(Submitted June 6, 1917. Decided June 12, 1917.)

[165 Pac. 913.]

***Warranty—Breach—Real and Personal Property—Fixtures—
Appeal and Error—Review—Ground of Objection—Instruc-
tions—Law of Case.***

Appeal and Error—Ground of Objection not Subject of Change on Appeal.

1. A ruling on the admission of evidence, though erroneous as made, may not be held erroneous on a ground different from that urged in the trial court.

Same—Instructions—Law of Case.

2. Where no criticism was made of instructions at the time of their settlement, they become the law of the case on appeal.

Warranty—Breach—Real and Personal Property—Fixtures.

3. In an action for damages for the breach of a warranty in a deed, in that a granary which was on the land when purchased had been subsequently removed by the vendor's tenant, who claimed it as his personal property, evidence *held* to show that the granary was the personal property of such tenant, and that this was known to the purchaser at the time the conveyance was made to him, both

from information received by him and the manner in which it rested upon the land.

Real and Personal Property—Fixtures—Rule.

4. As a general rule, the manner of an attachment to realty, the adaptability of the thing attached to the use to which the realty is applied and the intention of the one making the attachment, determine whether the thing attached is realty or personalty.

[As to when and against whom fixtures may maintain the character of personal property, see note in 84 Am. St. Rep. 877.]

Appeal from District Court, Flathead County; T. A. Thompson, Judge.

ACTION by Guy E. Padden against Dora Murgittroyd and another. From a judgment for plaintiff and an order denying a motion for new trial, defendants appeal. Reversed and remanded.

Cause submitted on briefs of Counsel.

Mr. J. H. Stevens, for Appellant.

Mr. Paul M. Wishon, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On August 28, 1913, the defendants executed a warranty deed to 80 acres of land situate in Flathead county, and delivered it to the Flathead County State Bank at Polson, Montana, with instructions to deliver the same to the plaintiff, upon his fulfilling on or before January 10, 1914, the conditions embodied in a written escrow agreement between the plaintiff and the defendants which accompanied the deed. These conditions were: That the plaintiff would pay the defendants \$3,200 as the purchase price of the land, \$1,000 upon the execution and deposit of the deed, \$500 on or before January 10, 1914, with interest at the legal rate on \$2,200 from the date of the deposit of the deed, until that time, and execute and deliver to defendants a first mortgage upon the land to secure the payment of \$1,700, the balance of the purchase price, which was to become due and payable within five years. The plaintiff having fulfilled the

conditions, the deed was delivered to him and he entered into possession of the land on or about January 6, 1914. Prior to the sale to the plaintiff the land had been occupied by B. F. Kashner as lessee of the defendants. When the deed was executed the term of the lease had not yet expired. In order to be able to deliver possession to the plaintiff, the defendants secured from Kashner a release of his rights. Kashner owned adjoining lands. He had theretofore constructed thereon a granary, described as 14 feet in width by 16 feet in length, with a shingle roof sloping from a height of 11 feet in front to 9 feet in the rear. It was constructed upon heavy timbers, which were designed to serve as skids, so that it could be moved from place to place as occasion required. During the term of his lease, Kashner had moved it from his own land to that in controversy. When the lease was surrendered, the granary was not removed, but it was understood by Kashner and the defendants that Kashner could remove it later. No mention was made of the granary either in the deed to plaintiff or the agreement accompanying it. A short time after plaintiff took possession, Kashner sought to remove the granary to his own land. The plaintiff refused to permit him to do so and proceeded to convert it into a dwelling-house. Thereupon Kashner brought an action against plaintiff in a justice's court in claim and delivery to recover possession of it, with the result that he was awarded judgment for \$150, the value of it, and costs taxed at \$18.50. The plaintiff paid the judgment, and thereupon brought this action for damages, alleging that the covenants of warranty in the deed had been broken by defendants, in that the granary was a part of the lands, tenements and hereditaments conveyed by it to the plaintiff. The defendants, besides denying that they had breached the covenants in the deed as alleged, averred that at the time of the execution and delivery of the deed, the granary was personal property; that plaintiff knew this fact; that it was not owned by the defendants; and that it was not conveyed, or intended to be conveyed, by the deed. There was issue by reply. At the trial, the plaintiff had verdict and

judgment for \$195.60 and costs, taxed at \$156.60. Defendants have appealed from the judgment and an order denying their motion for a new trial.

The integrity of the judgment is assailed on the grounds that the trial court erred to the prejudice of the defendants in admitting certain evidence, and that the verdict is contrary to the evidence. We shall omit consideration of the propriety of the rulings admitting the evidence, for the reason that the argument of counsel in this court presents a question wholly different [1] from that raised by his objection at the trial. The plaintiff was permitted to testify as to what the result was in the justice's court, including the amount of the judgment recovered against him and the fact that he had paid it. The objection was that this was not the best evidence; whereas the argument of counsel goes to the competency of the evidence to show the value of the granary. In other words, the objection went to the degree of the evidence, and not to its competency. The ruling, though it may be conceded to have been erroneous as made, may not be held erroneous on a ground different from that submitted to the trial court.

The vital question in the case is presented by the second contention. The theory upon which the trial proceeded, as is disclosed by the instructions submitted to the jury, was this: That when one conveys land to another, presumptively all buildings permanently resting upon it are included unless there is some reservation or exception thereof made in the instrument of conveyance, and hence that the burden was upon the defendants to show that the granary was the personal property of Kashner, and that this fact was known to the plaintiff at the time [2] the conveyance was made to him. We shall not stop to consider whether the theory upon which the trial court proceeded was the correct one or not. Since no criticism was made of the instructions at the time of their settlement, they became the law of the case for the purpose of these appeals.

The defendants, we think, fully sustained the burden cast [3] upon them. That the granary was the personal property

of Kashner there was no controversy. Neither was there any controversy but that, as between him and the defendants, its character as such was fully understood and recognized. This was apparent both from the statements of the defendants and from the plan of its construction as well as the use for which it was intended, *viz.*, to be moved from place to place as occasion or convenience for its use required, as was usually the case with such structures in that community, for it was erected upon skids to facilitate this mode of use. It was not attached to the surface, nor was it resting permanently thereon. Neither was there any controversy but that in August, when the plaintiff was negotiating for the purchase from the defendants, he went upon the land and observed fully the situation of the granary, the method of its construction, and the use to which it was then devoted. It was situated, not in connection with other permanent buildings or improvements, but at an isolated place in the field where the grain crop for that year had been threshed. The testimony of several of the witnesses tended strongly to show that at the time of the negotiations in August, and later, before the plaintiff made his second payment and took possession, he was fully informed of Kashner's rights. Both the defendants and the notary who prepared the deed and the agreement testified categorically that the ownership of the granary was fully discussed, and that it was understood that it was not included in the transaction. These witnesses all testified that the plaintiff was fully informed that the land was under lease to Kashner; that he owned the granary; that after the papers had been prepared and executed ready for deposit it was noticed that they contained no mention of the granary; that it was suggested by the notary that they should be amended by incorporating the exception, but that the plaintiff insisted that this was not necessary, as the situation was fully understood. Prior to his taking possession and during the month of December, the plaintiff occupied other land of the defendants adjoining that in controversy, preparing to take possession.

He was then informed that the granary belonged to Kashner. He nevertheless moved it and converted it into a dwelling. Two other witnesses testified that during the winter following the purchase plaintiff admitted to them that while he knew that Kashner owned the granary, since it was not mentioned in the contract he could hold it and intended to do so. The statements of all these witnesses were denied by the plaintiff. If the verdict rested upon this conflicting testimony alone, there would be merit in the contention of counsel for plaintiff that it was the exclusive province of the jury to resolve the conflict, and that its resolution of it became binding on this court. When, however, we consider the undisputed evidence as to the ownership of the granary, the plan of its construction manifesting the use as well as the mode of use for which it was intended, and the manner in which it rested upon the land, we are compelled to the conclusion that the plaintiff fully understood the character of it as personal property, that the defendants did not intend to convey it to him, and that he did not acquire title to it by his purchase. His denial of the statements of the witnesses was insufficient to overcome the inference made necessary by the physical facts, which were not controverted.

In *Montana Etec. Co. v. Northern Valley Min. Co.*, 51 Mont. [4] 266, 153 Pac. 1017, it was said: "As a general rule, the manner in which the attachment is made, the adaptability of the thing attached to the use to which the realty is applied, and the intention of the one making the attachment, determine whether the thing attached is realty or personalty." Accepting this as the determinative rule, the conclusion must follow that the plaintiff knew from the beginning that the granary was the personal property of Kashner. True, the granary was resting upon agricultural land and was intended for the housing of grain; but the character of its construction and the manner in which it rested on the land wholly excluded the idea that it was the intention that it should become permanently affixed to it. The evidence therefore wholly fails to justify the verdict.

The judgment and order are therefore reversed and the cause is remanded to the district court, with direction to enter judgment for the defendants.

Reversed and remanded.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

BAKER STATE BANK, RESPONDENT, v. GRANT ET AL.,
APPELLANTS.

(No. 3,785.)

(Submitted June 6, 1917. Decided June 12, 1917.)

[166 Pac. 27.]

Negotiable Instruments—Promissory Notes—Holder in Due Course—Warranty—Knowledge of Breach—Effect.

Promissory Notes—Holder in Due Course.

1. *Held*, under section 5900, Revised Codes, that knowledge of a warranty that an automobile would meet certain requirements as to service did not defeat a bank's claim as a holder in due course of promissory notes taken in payment of the machine before maturity and without being aware of a breach of such warranty.

[As to fraud in inception of a negotiable note as not prejudicing a *bona fide* holder, see note in 11 Am. St. Rep. 309.]

Same—Nature of Instruments.

2. By executing a negotiable promissory note, the maker is held to have intended that it may enter the channels of trade and pass from hand to hand unincumbered by any defense not known to exist when the transfer was made.

Appeal from District Court, Fallon County; Daniel L. O'Hern, Judge.

ACTION by the Baker State Bank against J. M. Grant and others. From a judgment for plaintiff and from an order denying them a new trial, defendants appeal. Affirmed.

Cause submitted on briefs of Counsel.

Messrs. Farr & Herrick, for Appellants.

Messrs. Booth & Dousman and *Mr. P. C. Cornish*, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On April 17, 1913, J. M. Grant, J. J. Johnston and R. V. Fuqua executed and delivered to Charles E. Clark ten promissory notes, each for the sum of \$200. Before maturity of any of the notes they were all indorsed and transferred by Clark to the Baker State Bank for their face value. The first note was paid at maturity and this action was brought to enforce payment of the other nine notes.

The principal defense interposed is that the ten notes were [1] given in payment for an automobile, sold and delivered by Clark to the defendants under an express warranty that the car would perform the services required of it by defendants in conducting an automobile stage line between Ekalaka and Baker; that at the time the notes were transferred by Clark, the bank knew the terms under which the automobile was sold and the notes given; that the car failed to render the services contemplated and was finally turned back to Clark about October 1; that there was a failure of consideration, and that the bank is not a holder in due course. Issue was joined by reply. At the conclusion of the testimony the court directed a verdict for the plaintiff, and defendants appealed.

While there is some conflict in the testimony as to the knowledge possessed by the bank at the time it purchased the notes, for the purpose of these appeals the evidence will be treated in the light most favorable to the defendants and as establishing that the bank knew what the consideration for the notes was and knew the terms of the contract of warranty.

The notes were transferred to the bank on the day following their execution and at a time when there had not been any breach of warranty to the knowledge of anyone. If at the very instant it purchased the notes, the bank had made inquiry of the defendants, it could not have ascertained that there was then any possible outstanding defense. It did know that the car was warranted to a certain standard of service, but it had a right to presume that the contract of warranty would be

carried out in good faith. Certainly, it could not anticipate that a contingency which might never happen would certainly happen. If a breach had occurred before the notes were transferred and the bank knew of such breach, it could not claim to be a holder in due course; but no one knew or could know at that time that the car would not meet all the requirements contemplated by the purchasers. Does the fact, then, that the bank knew when it took the notes that the car was sold under a warranty and that the consideration for the notes might possibly fail, defeat its claim to be a holder in due course?

Our Codes provide: "Sec. 5900. A holder in due course is a holder who has taken the instrument under the following conditions: 1. That it is complete and regular upon its face; 2. That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact; 3. That he took it in good faith and for value; 4. That at the time it was negotiated to him, he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

It has often been said that a negotiable promissory note is a courier without luggage whose face is its own passport. To such extent do notes of this character enter into and form a substantial part of the very life of the commercial world, that the law has always been solicitous to exclude any rules calculated [2] to hinder their free circulation and exchange. By the act of executing such an instrument, the maker is held to have intended that it may enter the channels of trade and pass from hand to hand unencumbered by any defense not known to exist when the transfer is made. The rule is concisely stated in 3 Ruling Case Law, 1067, as follows: "The courts universally hold that knowledge that a note was given in consideration of the executory agreement or contract of the payee which has not been performed, will not deprive the indorsee of the character of a holder in due course, unless he also has notice of the breach of that agreement or contract. So knowledge of a warranty on a sale in which a note was given is held not to affect the

rights of a purchaser of the note for value before maturity, if he had no knowledge of the breach of the warranty." (*Miller v. Ottaway*, 81 Mich. 196, 21 Am. St. Rep. 513, 8 L. R. A. 428, 45 N. W. 665; *Jennings v. Todd*, 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148; *Kublee v. Davis*, 33 Neb. 779, 29 Am. St. Rep. 509, 51 N. W. 135; *Siegel, Cooper & Co. v. Chicago Trust & Savings Bank*, 131 Ill. 569, 19 Am. St. Rep. 51, 7 L. R. A. 537, 23 N. E. 417; *United States Nat. Bank v. Floss*, 38 Or. 68, 84 Am. St. Rep. 752, 62 Pac. 751; 8 Corpus Juris, 509.)

A clear distinction is to be drawn between the case at bar and the cases cited above, on the one hand, and cases of which *Citizens' State Bank v. Garceau*, 22 N. D. 576, 134 N. W. 882, is typical, on the other. In the last case, Garceau executed and delivered his promissory note to Stevens in payment of the first premium on a policy of life insurance. The note accompanied the application. Title to the note was to pass to Stevens if the application was accepted by the insurance company and the policy issued; otherwise the note was to be returned to Garceau. Before the application was acted upon, Stevens indorsed and transferred the note to the bank which then knew all the facts concerning the transaction. The application for insurance was rejected, and in an action by the bank to collect the note, the court held that Stevens did not have an unqualified title to the note, and the bank, with knowledge, acquired no better title than he had; that upon rejection of the application the consideration for the note failed altogether, and that the maker could properly avail himself of the defense that the bank was not a holder in due course. In the case at bar, the unqualified title to the note passed to Clark upon the delivery of the automobile, and upon indorsement by him the title passed to the bank, free from any defenses not then known to exist.

The plaintiff brings itself within the definition of a holder in due course, as given in section 5900 above. The trial court ruled correctly, and its judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

BRUNSWICK-BALKE-COLLENDER CO., RESPONDENT, v.
HIGGINS, APPELLANT.

(No. 3,781.)

(Submitted June 6, 1917. Decided June 16, 1917.)

[165 Pac. 1109.]

Pledges—Definition—What does not Constitute.

Pledge—Definition.

1. The elements made essential by sections 5774 and 5775, Revised Codes, to the creation of a contract of pledge are (1) a delivery of personal property by the owner to the pledgee (2) under an agreement, express or implied, and with the intention by both parties, that the pledgee shall hold it as security for the payment of a debt or the performance of some obligation.

Same—What does not Constitute.

2. Where personal property (bowling-alley and billiard-hall fixtures), bought on credit and not fully paid for, had been left by the purchaser on rented premises, and later resold by their original owner, with the consent of the first buyer and under an agreement with the landlord that out of the amount received on the resale the latter should be paid the rent then due him from the first buyer, the goods being turned over to the new buyers for the purpose of conducting a bowling-alley business and not with any idea that they should hold them as security for the overdue rent, the transaction did not constitute a pledge as defined in paragraph 1, *supra*.

[As to definition and nature of pledge, see note in 49 Am. Dec. 730.]

Appeal from District Court, Powell County; Geo. B. Winston, Judge.

ACTION by the Brunswick-Balke-Collender Company against W. I. Higgins. Judgment for plaintiff. Defendant appeals from the judgment and order denying him a new trial. Affirmed.

Mr. S. P. Wilson, for Appellant, submitted a brief and argued the cause orally.

Mr. W. E. Keeley, for Respondent, submitted a brief.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action in claim and delivery. The trial was by the court without a jury. Plaintiff had judgment. Defendant has ap-

pealed from the judgment and an order denying his motion for a new trial. The subject of the controversy is the right to the possession of property described in the complaint as "two bowling-alleys complete with equipment, said equipment consisting of bowling-pins, bowling-balls, electric-light fixtures, bumpers, score-boards, floor lumber, railings, screws, gutters and other property appurtenant to the successful use of said bowling-alleys."

The complaint is in the usual form, alleging ownership in plaintiff and its right to immediate possession. The answer, admitting the general ownership of the property in plaintiff, put in issue the right of possession. The evidence does not present any substantial conflict. The merit of the appeals, therefore, is to be determined by a solution of the inquiry whether, upon the admitted facts appearing below, the defendant was entitled to retain possession of the property by virtue of a lien in his favor arising out of an agreement between him and the agents of plaintiff. The facts are these:

The defendant resides in Deer Lodge, Powell county. The plaintiff, a Montana corporation, conducts in the city of Butte the business of dealing in billiard and pool tables, bowling-alleys and other similar goods. On March 9, 1912, through one of its agents, it sold under a conditional sale contract the property described in the complaint to J. J. Arndt at Deer Lodge. The price agreed upon was \$950, of which \$500 was to be paid in cash, and the balance in ten equal monthly installments with interest. The contract was in writing and filed with the county clerk, as required by the statute (Laws of 1911, Chap. 52). The property was installed in a building owned by the defendant, then held under a lease by Arndt for the purpose of conducting a bowling-alley, at a monthly rental of \$30. Arndt thereafter made payments upon the balance of the purchase price, until it had been reduced to \$275. The business not proving profitable, he had fallen in arrear in the payment of rent for the building to the amount of \$125. Early in 1913 he surrendered the building to defendant, leaving the property

therein as it was originally installed. This was the condition of affairs on May 16, 1913. In the meantime the defendant, not knowing that plaintiff held the title, was about to attach the property to enforce payment of the arrears of rent. The plaintiff did not desire to have the property taken from the building which would be the result if proceedings were begun. In conjunction with the defendant, it obtained the consent of Arndt to sell it upon such terms as would enable it to realize an amount sufficient to discharge the balance of the purchase price and also the arrears of rent due defendant. Through D. J. Harrington, a salesman, on the date last mentioned it effected a sale to George Gallagher and Walter Harnack, who undertook to conduct a bowling-alley in the same building under the firm name of Gallagher & Harnack. The price agreed upon was \$400, of which \$50 was to be paid in cash and the balance in ten equal monthly installments with interest, the contract being in the same form as that made with Arndt. Gallagher & Harnack were then permitted to take possession of the building and conduct the business. The business proving unprofitable they defaulted in their payments under their contract with plaintiff and abandoned the building, leaving the property there. The sum of \$400 was fixed as the price to Gallagher & Harnack to cover the amounts due both plaintiff and the defendant. This was so fixed because the defendant objected to allowing Gallagher & Harnack to occupy the building and to continue the business therein unless the agent of plaintiff would assume for it the obligation to pay the rent due to defendant from Arndt. There is some uncertainty in the evidence as to whether the negotiations were conducted for the plaintiff with Arndt, Gallagher & Harnack and the defendant by Harrington, the salesman, or by James M. Reynolds, who was then the general manager of plaintiff. The evidence as a whole, however, justifies the inference that they were conducted by Harrington, and the result approved and confirmed by Reynolds. The following excerpt from the testimony of defendant shows what the result was: "Mr. Reynolds and I visited Mr. Arndt in regard to the alleys, and Mr.

Arndt said that he could make no further payments and for us to take them and get our money out of them for the Brunswick-Balke-Collender people and myself, and we agreed to do that and Mr. Reynolds agreed to do that. Arndt turned them over to Reynolds and myself, Reynolds acting for the Brunswick-Balke people. This was over the shops, in the boiler-shop, I think, across the river. The exact date I cannot remember, but after Mr. Arndt had turned the building over to me and I had locked it. The agreement between me and Mr. Reynolds was that he would sell those alleys and Mr. Reynolds for the company was to retain a balance that was due them on the purchase price and I was to get my money for the rent; that was the agreement. In the meantime the alleys were to remain in my building. And he did not want them taken up, for the reason that he thought they would [be] more valuable as they were, that he could sell them better while they were down. This never was paid to me, nor any part of it." In another place in his testimony he stated that he relinquished his purpose to enforce payment of the rent due from Arndt by attachment proceedings, because of the agreement by Reynolds to protect him in the payment of it. He testified in effect, also, that he was to receive payment at once from plaintiff, and that, though he thereafter made several demands by letter and by telephone, payment was never made to him notwithstanding repeated promises. There was no agreement as to how long the property was to remain in the building, nor any agreement that Gallagher & Harnack were to hold the property for the benefit of defendant. It does not appear distinctly whether Arndt was released from his obligation to pay defendant. For present purposes it may be assumed that he was.

It was argued by counsel that though the agreement was oral and informal, it created a pledge of the property to defendant to secure the payment of the rent due from Arndt, and hence that defendant was entitled to retain possession until

plaintiff had made or tendered payment. This contention is without foundation in the facts.

“Pledge is a deposit of personal property by way of security [1] for the performance of another’s act.” (Rev. Codes, sec. 5774.) “Every contract by which the possession of personal property is transferred, as security only, is to be deemed a pledge.” (Sec. 5775.) The elements here made essential to the creation of a contract of pledge are (1) a delivery of personal property by the owner to the pledgee (2) under an agreement that the latter shall hold it as security for the payment of a debt or the performance of some obligation. (*Averill Machinery Co. v. Bain*, 50 Mont. 512, 148 Pac. 334.) The agreement need not be in writing. (31 Cyc. 796.) It may be express or implied, but the property must be delivered and held in possession by the pledgee as security to which he may resort in order to enforce a discharge of the debt or obligation assumed by the pledgor. (Rev. Codes, sec. 5788.) Whether the agreement is express or implied, the intention of the parties must be clear. In other words, the transfer must have been made with the intention by both parties that the property is to be held as a security. In 31 Cyc., at page 787, the elements of a pledge are stated thus: “The three elements necessary to constitute a contract one of pledge are: (1) The possession of the pledged property must pass from the pledgor to the pledgee or to some one for him; (2) the legal title to the pledged property must remain in the pledgor; (3) the pledgee must have a lien on the property for the payment of a debt or performance of an obligation due him by the pledgee or some other person. And every contract by which the possession of personal property is transferred as security only is to be deemed a pledge. But the agreement that property is to be held as a pledge must be clearly expressed or implied, and a mere loose understanding, or statements by one party to which the other does not assent, are not sufficient to constitute a contract of pledge.” Mr. Jones, in his work on Collateral Securities, defines a pledge thus: “A pledge may be defined to be a deposit of personal property as

security, with an implied power of sale upon default.” (Jones on Collateral Securities, 3d ed., sec. 1). To the same effect is the definition by Mr. Story (Story on Bailments, 9th ed., sec. 286).

Applying these definitions to the agreement between the [2] plaintiff and the defendant and the disposition of the property in pursuance of it, we find that the result was not a pledge. In the first place, though at the time the agreement was made the property was technically in the possession of the defendant, it was delivered to Gallagher & Harnack when they began to occupy the building, not to be held by them as security for the defendant, but to be used in the conduct of their own business. They were not parties to the agreement between plaintiff and defendant, and so far as either was concerned, they were at liberty at any time to pay the purchase price and remove the property. Their possession was therefore not that of the defendant nor was it held for him. The defendant having expressly agreed that the plaintiff should effect a sale for the purpose of realizing enough money to pay the balance due it and to defendant, the conclusion is necessary that the plaintiff had the right to sell and deliver possession to the purchaser as it did. In the second place, according to defendant's own testimony, plaintiff promised to pay the amount due him at the time possession was delivered to Gallagher & Harnack. Thus he let go of the possession upon the faith of this promise, and chose to look solely to it for the amount due him. True, the property was to remain in the building, but the stipulation that the plaintiff was to effect the sale and retain a balance of the selling price to pay the Arndt rent is conclusive proof that the security he looked to was the promise of plaintiff and not the property. The stipulation that the property was not to be removed was clearly for the sole benefit of the plaintiff. It was the consideration upon which it assumed to become bound to pay the Arndt rent. When it failed to make payment, defendant became entitled only to bring action against it as for a breach of contract to pay money.

We think the trial court reached the correct conclusion. The judgment and order are therefore affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

IN RE RILEY'S ESTATE. RILEY, APPELLANT, v. MOUAT,
RESPONDENT.

(No. 3,778.)

(Submitted June 6, 1917. Decided June 16, 1917.)

[165 Pac. 1105.]

Probate Proceedings—Letters of Administration—Husband and Wife—Common-law Marriage—Evidence—Appeal and Error—Jurisdiction—Waiver—New Trial—Verdict “Against Law.”

Appeal and Error—New Trial—Waiver.

1. Error in granting a new trial on a petition for letters of administration was waived by failure to appeal from the order.

Same—Jurisdiction—Waiver.

2. Participation by appellant in the new trial proceedings referred to above, and failure to make appropriate objection in the trial court to its jurisdiction over the proceedings following the order granting the new trial, *held* to have been tantamount to a voluntary appearance and waiver of the question of jurisdiction.

[As to what proceedings are inconsistent with motion for new trial so as to waive right to move, see note in *Ann. Cas.* 1914B, 612.]

Probate Proceedings—Letters of Administration—Husband and Wife—Common-law Marriage—Evidence—Insufficiency.

3. Where in a proceeding to obtain letters of administration it appeared that a ceremonial marriage had never taken place between petitioner and decedent, that the relations existing between the parties began when the latter had a living wife, and were therefore clandestine, and the evidence was conflicting on the question of their public assumption of the marriage relation after the death of decedent's wife, the judgment of the trial court that petitioner was not decedent's widow *held* supported by sufficient evidence.

Same—New Trial—What is not Decision “Against Law.”

4. The trial of matter of the character of the above to the court without a jury, resulting in findings of fact warranted by the evidence, conclusions of law based upon the findings, and a judgment

following both, presents no example of "a verdict or other decision" which is "against law" within the meaning of section 6794, Revised Codes, for which a new trial may be granted.

Appeal from District Court, Silver Bow County, in the Second Judicial District; Geo. B. Winston, Judge of the Third District, presiding.

PROCEEDING by Emma Riley for letters of administration in the Matter of the Estate of Joseph P. Riley, deceased. From an order granting letters to Mary F. Mouat, Emma Riley appeals. Affirmed.

Cause submitted on briefs of Counsel.

Mr. Edwin M. Lamb and Mr. W. A. Pennington, for Appellant.

Messrs. Canning & Geagan and Mr. E. P. Kelly, for Respondent.

MR. JUSTICE SANNER delivered the opinion of the court.

Joseph P. Riley, of Butte, died leaving some estate but no will. His sister, Mary F. Mouat, filed, in the district court of Silver Bow county, her petition for letters of administration of his estate, alleging, among other things, that she and Mervin Riley, his minor son, are his heirs at law. A few days later Emma Riley, alleging herself to be the widow of Joseph P. Riley, filed a like petition together with written objections to the appointment of Mrs. Mouat. Upon these representations the matter was brought on for hearing, which hearing resulted in an order granting the petition of Emma Riley and directing the issuance of letters to her. Thereupon Mrs. Mouat moved for a new trial and this motion was heard and granted. The retrial was had, and its result was to adjudge that Emma Riley is not the widow of Joseph P. Riley, deceased, and to order that letters of administration issue to Mrs. Mouat. From this order Emma Riley appeals.

A reversal is sought upon these grounds: That error occurred in granting a new trial; that the adjudication appealed from is invalid because the court had no jurisdiction of the subject matter after the order granting a new trial was made; that the adjudication is not warranted by the evidence presented; that the adjudication is against law.

1. It will suffice to answer the first of these to say that if [1] the granting of the new trial be viewed as error within jurisdiction, it cannot avail the appellant now; her remedy, which she failed to pursue, was by appeal from the order.

2. The contention that the court had no jurisdiction is based [2] upon the assertion that there was no pleading of any kind filed as against the appellant's application for letters; therefore there was no issue of fact properly raised to be retried and a new trial was not allowable under the decisions of this court in *In re Antonioli's Estate*, 42 Mont. 219, 111 Pac. 1033, and *State ex rel. Culbertson Ferry Co. v. District Court*, 49 Mont. 595, 144 Pac. 159. The appellant is not in position to urge this, because the record shows that she participated in the new trial proceeding, failed to appeal from the order granting a new trial, and failed to make in the court below any appropriate objection to the jurisdiction over the proceedings following the order. Jurisdiction in all matters of probate is vested in the district court by law (Rev. Codes, sec. 6275), and the appellant's conduct was tantamount to a voluntary appearance and waiver, so far as she was concerned, of the question of jurisdiction in the particular instance. (*In re Graye*, 36 Mont. 394, 93 Pac. 266; *In re Blackfeather's Estate* (Okl.), 153 Pac. 839.)

3. No valuable purpose would be served by canvassing the [3] evidence at length. The appellant and Joseph P. Riley were never joined by any ceremonial marriage; their relations began when Riley had a living wife, were therefore clandestine and of no force as a public assumption of the marriage relation; there was testimony from which the court could have concluded that after the death of Mrs. Riley, the appellant and Joseph P. Riley did mutually and publicly assume the marriage

relation, and there was testimony sufficiently contradictory to enable the court to say that they did not, within the decisions of this court in *O'Malley v. O'Malley*, 46 Mont. 549, Ann. Cas. 1914B, 662, 129 Pac. 501, and *In re Huston's Estate*, 48 Mont. 524, 139 Pac. 458. Such being the situation, we may not interfere and substitute our judgment for that of the judge who saw the witnesses and could form a first-hand opinion of their credibility; but we must hold that the evidence was sufficient.

4. Counsel for appellant does not indicate wherein the adjudication is "against law," other than as involved in the propositions above considered. In the statute that phrase has a specific application as specifying one of the grounds for a new trial (Rev. Codes, sec. 6794), reviewable only on appeal from an order denying a new trial. Certain it is that the trial of a matter to the court without a jury, resulting in findings of fact warranted by the evidence, conclusions of law based upon the findings and a judgment following both, presents no example of "a verdict or other decision" which is "against law."

The order appealed from is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STATE, RESPONDENT, v. TUFFS, APPELLANT.

(No. 3,927.)

(Submitted June 4, 1917. Decided June 18, 1917.)

[165 Pac. 1107.]

Licenses—Itinerant Venders—Principal and Agent—Del Credere Commissions—Penal Statutes—Construction.

Licenses—Itinerant Venders—Who are Not.

1. *Held*, that the representative or agent of a company or corporation which is doing business at a fixed place, who takes orders for future delivery of goods kept by his principal in connection with and handled through its fixed place of business, prices at which they

are sold being fixed by it, title to the goods remaining in it, and undelivered goods to be returned to it, is not an itinerant vender, within the meaning of section 1 of Chapter 110, Laws of 1911, and therefore not required to procure the license provided for by the Act.

[As to license taxes imposed by states upon peddlers, see note in 96 Am. St. Rep. 844.]

Same—Sales—Agency—*Del Credere* Commissions.

2. Where a dealer consigns goods with the understanding that title to them shall remain in him until sold and delivered by the consignee, who shall be responsible for the payment of their purchase price and return undelivered goods to the consignor, the relationship created is substantially that of principal and agent to sell upon a *del credere* commission.

Principal and Agent—Agreement to Secure Against Loss.

3. A principal and his agent may agree that the former shall be secured against loss on account of sales to irresponsible parties or on account of the mistakes or dishonesty of the agent.

Penal Statutes—Construction.

4. The provisions of a statute which is penal in character are not to be extended by implication.

Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.

ACTION by the state against F. A. Tuffs. From a judgment of guilty and from an order denying him a new trial, defendant appeals. Reversed and remanded.

Mr. J. D. Taylor, for Appellant, submitted a brief and argued the cause orally.

An "itinerant vender" has been defined to be a person who sells and delivers the identical goods he carries with him. (*State v. Lee*, 113 N. C. 681, 37 Am. St. Rep. 640, 18 S. E. 713.) Only the person who itinerates for trading purposes is a peddler. So, an employer, though he be owner of the goods, the team and vehicle, is not required to obtain a license or be subject to any forfeiture for failure so to do. (*Wrought Iron Range Co. v. Johnson*, 84 Ga. 754, 8 L. R. A. 273, 3 Interstate Com. Rep. 146, 11 S. E. 233.) It is the method of disposing of the goods which makes one a peddler. A peddler is simply one who peddles, and anyone peddles who sells at retail from place to place, going from house to house, carrying the goods to be offered for sale with him. (*Dewitt v. State*, 155 Wis. 249, 144 N. W. 253.)

In *Crenshaw v. Arkansas*, 227 U. S. 400, 57 L. Ed. 565, 33 Sup. Ct. Rep. 294, the court says a person who solicits orders by sample from house to house for a resident merchant is not a peddler. (See, also, *Davenport v. Rice*, 75 Iowa, 74, 9 Am. St. Rep. 454, 39 N. W. 191.) And employees of a merchant who has an established place of business in the state who go through the surrounding country soliciting orders which they later deliver are not peddlers. (*Waterloo v. Heely*, 81 Ill. App. 310; *Commonwealth v. Eichenberg*, 140 Pa. St. 158, 21 Atl. 258; *State v. Wells*, 69 N. H. 424, 48 L. R. A. 99, 45 Atl. 143; *Commonwealth v. Farnum*, 114 Mass. 267; *Stuart v. Cunningham*, 88 Iowa, 191, 20 L. R. A. 430, 55 N. W. 311; *Rex v. McKnight*, 10 Barn. & C. 734; 109 Eng. Reprint, 623.) Nor is one a peddler who solicits orders for a nonresident grocer and tea house, and at the time of delivery solicits further orders, the solicitation being done at the residence of the purchasers. (*Great Atlantic & Pacific Tea Co. v. Tippecanoe*, 85 Ohio St. 120, 96 N. E. 1092.) By the decided weight of authority it has been held that one who sells by order or sample, delivery to be made at another time, is not a peddler. (*Ideal Tea Co. v. Salem*, 77 Or. 182, 150 Pac. 852; *Wausau v. Heideman*, 119 Wis. 244, 96 N. W. 549; *State v. Hoffman*, 50 Mo. App. 585; *People v. Jarvis*, 112 N. Y. Crim. Rep. 333, 19 App. Div. 466, 46 N. Y. Supp. 596.)

Mr. J. B. Poindexter, Attorney General, and *Mr. John H. Alvord*, Assistant Attorney General, for Respondent, submitted a brief; *Mr. Frank Woody*, Assistant Attorney General, argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This cause was submitted upon an agreed statement of facts. The defendant was found guilty and appealed from the judgment and from an order denying him a new trial.

The prosecution was conducted under Chapter 110, Laws of [1] 1911. Section 1 of the Act defines an itinerant vender, and that definition, so far as applicable here, follows: "Every person who personally solicits orders for the future delivery of any goods, wares or merchandise, either by or without sample, including peddlers and hawkers, is an itinerant vender within the meaning of this Act; Provided, however, that this section shall not apply * * * to * * * the representative of any * * * corporation doing business at a fixed place of business, and taking orders for the future delivery of any goods, wares or merchandise, kept at or in connection with and handled through such fixed place of business."

The acts of the defendant bring him within the inhibition of the statute unless he belongs to the class mentioned in the proviso, and the only question presented for solution is: Was the defendant the representative of a corporation doing business at a fixed place of business, and taking orders for the future delivery of goods kept by such corporation in connection with and handled through its fixed place of business? If he was such representative, the statute does not apply to him. If he was not, he was required to procure a license, and his failure to do so subjected him to the penalty prescribed by the statute.

The question for solution seems to be answered by the agreed statement of facts itself. It was agreed in the court below as follows: (1) The Grand Union Tea Company is a corporation engaged in mercantile business in this state, with a fixed place of business in Helena. (2) Defendant was in the employ of the company, soliciting orders from various persons in Ravalli county "for said Grand Union Tea Company" for coffee, tea and spices kept by the company at its store in Helena. (3) The orders, when taken, were sent by mail to the company at Helena and by it filled and the goods then shipped to the company's order to Hamilton in care of the defendant. A draft accompanied the bill of lading and the carrier was instructed to deliver the goods to defendant upon receiving payment of the draft. (4) Upon receipt of the goods, defendant then delivered

them "to the various customers of said Grand Union Tea Company who had previously ordered the same. * * * That all the goods delivered by Mr. Tuffs were previously ordered from the Grand Union Tea Company by the various customers to whom delivery was made." (5) The orders taken were not signed by the customers, and the names of the customers were not known to the company, but were kept by defendant subject to inspection by the company. (6) The company looks to the defendant for the price of the goods so shipped by it, except such portions as are not delivered; these to be returned to the company. (7) The defendant traveled about in a vehicle soliciting the orders, but no goods were sold by him from his vehicle, and the only goods delivered by him were such as had previously been ordered, and each individual order filled by the company from its stock kept in Helena.

It is made plain by this agreed statement that the Grand Union Tea Company is engaged in mercantile pursuits at a fixed place of business in this state and that the defendant was in its employ in soliciting orders for goods kept by the company in stock at its Helena store. He solicited orders—not for himself but "for said Grand Union Tea Company." Each order was filled separately by the company from its stock in Helena and the orders thus filled were delivered, not to the defendant's customers, but "to the various customers of said Grand Union Tea Company who had previously ordered the same." As if to make this fact more emphatic, the statement is repeated in substance: "All the goods delivered by Mr. Tuffs were previously ordered from the Grand Union Tea Company by the various customers to whom delivery was made." Goods previously ordered by a customer but for any reason not delivered to him are returned to the company. These provisions seem to leave no doubt that the goods belong to the company until delivery is made to the customer, and that in soliciting the orders and making deliveries the defendant acted as the representative of the company; and this position is fortified by reference to defendant's contract of employment which is made a part of the

agreement. That contract designates the company "employer" and the defendant "salesman," and provides: The Grand Union Tea Company agrees: (1) To pay to the salesman as compensation for his services twenty-five per cent on sales of baking powder; twenty per cent on tea, spices, extracts and sundries, and fifteen per cent on coffee and soap. (2) To furnish a wagon and harness for the conduct of the business. (3) To pay freight on shipments of goods. The salesman agrees: (1) Not to sell or exchange fixtures or equipment supplied by the employer without authority in writing. (2) Not to incur any obligations in the name of the employer. (3) Not to make repairs on equipment until first authorized by the employer. (4) Not to buy the route of another salesman nor sell his own route. (5) Not to sell any goods except those belonging to the company. Thus far the contract appears to be one of agency. "An agent is one who represents another called the principal in dealing with third persons." (Sec. 5413, Rev. Codes.)

There are, however, certain other provisions which at first blush seem to involve the transaction, as between the employer and the salesman, in doubt. The provision that the salesman shall pay for the goods upon their delivery to him, if standing alone, would seem to indicate that an absolute sale was contemplated and that title to the goods passed to the salesman before they were delivered by him to the customers. In cases arising from the consignment of goods under special contract, it is often difficult to distinguish between a sale absolute and a contract of agency, because of the mixed motives of the parties and the artless or artful framing of the contract it frequently contains provisions characteristic of each. If the contract provides that the consignee shall pay for all goods delivered to him, whether they are sold and delivered to the customers or not, and that he may sell or otherwise dispose of them to whom he will and at whatever price he will, the transaction is a sale whatever term may be applied by the parties to describe it. On [2] the other hand, if title to the goods remains in the consignor and undelivered goods are to be returned to it, the trans-

action is one of agency, even though the consignee may be held responsible for the payment of the purchase price of the goods delivered to the customers. (31 Cyc. 1200, 1201.) The relationship is substantially that of principal and agent to sell upon a *del credere* commission. In *Leverick v. Meigs*, 1 Cow. (N. Y.) 645, it is said that the legal effect of a *del credere* agreement is that the agent for a consideration, when he sells the goods of his [3] principal, becomes bound to pay the price at all events. (2 Mechem on Agency, sec. 2534.) It is competent for a principal and his agent to agree that the principal shall be secured against loss on account of sales to irresponsible parties or on account of the mistakes or dishonesty of the agent. It is not essential to the existence of the relationship of principal and agent that the agent be clothed with authority to incur obligations in the name of the principal. "An agent has such authority as the principal actually or ostensibly confers upon him." (Sec. 5430, Rev. Codes.)

Though it is extremely difficult to reconcile some of the conflicting averments which appear in the agreed statement (including the contract), we are led to the conclusion from a consideration of all the provisions that title to the goods remained in the Grand Union Tea Company until delivery was made to its customers; that the company fixed the prices at which the goods were sold; that defendant's interest extended no further than his commissions upon the sales made by him, and that the obligation imposed upon him to advance the price upon receipt of the goods was intended merely to relieve the company from possible loss. (*Grand Union Tea Co. v. Evans*, 216 Fed. 791.)

The statute under which the prosecution is conducted is penal [4] in character, and its provisions are not to be extended by implication. (*In re Wisner*, 36 Mont. 298, 92 Pac. 958.) In order to subject this appellant to the penalty of the statute, it must appear clearly that his acts were within the letter as well as the spirit of the Act. (*McLaughlin v. Bardsen*, 50 Mont. 177, 145 Pac. 954.) We think it cannot be said that this appel-

lant is an itinerant vender within the meaning of the statute in question.

Cases not directly in point, but illustrating in a measure the views herein expressed, are: *State v. Wells*, 69 N. H. 424, 48 L. R. A. 99, 45 Atl. 143, *State v. Bristow*, 131 Iowa, 664, 109 N. W. 199.

The judgment and order are reversed and the cause is remanded, with direction to discharge the defendant.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

RUDE, RESPONDENT, v. MARSHALL, APPELLANT.

(No. 3,784.)

(Submitted June 8, 1917. Decided June 25, 1917.)

[166 Pac. 298.]

Ejectment—Title by Prescription—Adverse Possession—Presumptions—Burden of Proof—Boundaries—Mistake—Effect.

Ejectment—Title—Presumptions.

1. Plaintiff in an action in ejectment having shown legal title in himself, it will be presumed that defendant held possession of the disputed ground in subordination to such legal title.

[For what property or invasion of possession ejectment is maintainable, see note in 116 Am. St. Rep. 568.]

Same—Adverse Possession—Burden of Proof.

2. The burden of proof was upon defendant to show, as he claimed, that his possession as well as that of his predecessor, covering in the aggregate a period of ten years immediately prior to the commencement of plaintiff's action in ejectment, was adverse.

Same—Title by Prescription—What Constitutes.

3. Adverse possession for a period of ten years immediately prior to the commencement of an action in ejectment confers title by prescription sufficient against all.

Same—Adverse Possession—How Intention may be Manifested.

4. The erection of a fence ten feet high inclosing ground of which the person erecting it was then in possession, held to have been a sufficient manifestation of his intention to claim and hold the land thus inclosed as his own, declarations or assertions by the occupant not being essential to constitute the possession adverse

Same—Adverse Possession—Boundary Lines—Mistake—Effect.

5. A mistaken belief on the part of all concerned in an action in ejectment as well as on that of their predecessors, that the line on which a fence had been erected was the true boundary line, whereas, according to plaintiff's claim, it encroached upon his property from 1.12 to 2 feet, could not, in the absence of an agreement or understanding between the adjoining owners with respect to the dividing line, destroy the claim of adverse possession; such a mistake not affecting the operation of the rule relating to the acquisition of title by prescription.

Appeal from District Court, Silver Bow County; J. B. McClernan, Judge.

ACTION by John Rude, administrator of the estate of Magna Rude, deceased, against J. W. Marshall. From a judgment for plaintiff and an order denying him a new trial, defendant appeals. Reversed and remanded.

Mr. L. J. Hamilton, for Appellant, submitted a brief and argued the cause orally.

Mr. Wm. F. Davis, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1897 Joseph Bohler was the owner of lot 1, block 10, of the Butte town site, forty-two feet wide east and west, and 100 feet north and south, and then sold the south half (42x50) to the Parrys, and at the same time erected a fence on or near the line dividing the two portions. By mesne conveyance M. T. Walsh obtained title to the north half about 1898, and in 1905 he sold and conveyed it to defendant, Marshall, who during the same year erected upon the property a substantial stone building, the south wall of which extended to the line of the Bohler fence. In 1909 Magna Rude succeeded to the interest of the Parrys in the south half, and in 1914 she commenced this action in ejectment, claiming that defendant's building encroaches upon her ground 1.12 feet at the west end of the building and two feet at the east end or Alaska Street front. By answer the de-

fendant denied all the material allegations of the complaint, and pleaded estoppel and title by adverse possession. Plaintiff prevailed in the court below, and defendant appealed.

Without stopping to consider the unsatisfactory evidence offered in support of plaintiff's claim, or the merits or demerits of defendant's contention that plaintiff is estopped to assert title to the ground in dispute, we confine ourselves to the defense of adverse possession, as it is determinative of the controversy.

There is not any conflict in the evidence. The question for determination is: What is the legal effect of the evidence produced by defendant in support of his claim to title by adverse possession? For sixteen years prior to the commencement of this action, defendant and his predecessor Walsh were in the quiet, undisputed, and uninterrupted possession of the ground north of the Bohler fence, including the north half of lot 1 and the ground brought into controversy by this action. Since 1905 defendant's possession has been characterized by every element which enters into the doctrine of prescription. However, in order to sustain this defense it is necessary for defendant to tack on his possession to that of his predecessor Walsh for at least a sufficient period to amount in the aggregate to ten years, the period of the statute of limitations. While it is beyond question that Walsh was in actual, exclusive, peaceable and uninterrupted possession from 1898 until he sold to Marshall, it is the contention of plaintiff that the evidence is insufficient to show that Walsh's possession was hostile. Plaintiff having shown that [1] she secured a deed to the south half of the lot which presumably conveyed the legal title to her, it will be presumed in the first instance that defendant held possession of the disputed strip in subordination to such legal title if, as we will assume, the fence actually encroaches upon the south half of the lot. (Sec. 6435, Rev. Codes; *Lamme v. Dodson*, 4 Mont. 560, 2 Pac. 298; *Peters v. Stephens*, 11 Mont. 115, 28 Am. St. Rep. 448, 27 Pac. 403.) The burden of proof was therefore upon the de- [2] fendant to show that his possession and the possession of his predecessor Walsh, covering in the aggregate a period of ten

years immediately prior to the commencement of this action, was adverse. (*Jennings v. Gorman*, 19 Mont. 545, 48 Pac. 1111.) If defendant proved such adverse possession for the [3] required period, then he showed a title absolute in himself to the disputed strip. Section 4571, Revised Codes, provides: "Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all." (*State v. Auchard*, 22 Mont. 14, 55 Pac. 362; *Morrison v. Linn*, 50 Mont. 396, 147 Pac. 166.)

It is not made certain by this record just what purpose Bohler [4] had in erecting the fence in the first place, but from the fact that he built it at the time he sold the south half of lot 1 to the Parrys, it is fairly inferable that it was his purpose to mark the dividing line between the portion sold and the portion to the north retained by himself; but, however this may be, the character of the possession of the portion north of the fence after Walsh purchased is not left in doubt. In 1898, while the Parrys owned the south half of the lot and were in actual possession of whatever portion thereof lay south of the fence, and while Walsh owned the adjoining north half and was in possession of all of the lot north of the fence, he made known the fact that he was having some difficulty, and to avoid it he employed a contractor to repair and extend the Bohler fence. In company with the contractor, Walsh pointed out where the work was to be done, and under his direction the contractor built into and upon the old fence, making of it a substantial inclosure ten feet high. That this act was directed against the Parrys is certain. They were the adjoining owners in possession of and occupying the ground immediately south of the fence, and the only ones against whom it could have been aimed. But, furthermore, Mrs. Parry testified that she was present when the work was being done, and spoke to the contractor concerning it. "He couldn't have it too high, and I told him to put it higher." The fence was maintained in that condition until removed by Marshall to make way for his building.

But it is contended by plaintiff that the evidence does not disclose that Walsh ever told anyone that he claimed all the ground up to the fence, and therefore it is insufficient to show that his holding was adverse, and *Janke v. McMahon*, 21 Cal. App. 781, 133 Pac. 21, is cited as authority for this contention, and apparently supports it. In the course of the opinion it is said: "The disputed strip was inclosed with and as a part of the lot belonging to McMahon, Sr., and the back porch of his house partially rested upon said strip, but there is no further basis for the claims of title. There is no evidence that he ever declared that he owned the land, or that he intended to retain it as against the holder of the legal title." If it was the intention to announce the doctrine that one who claims to hold adversely must make his intention manifest by word of mouth, proclaiming from the housetops his purpose, then we must respectfully decline to follow or approve a rule directly opposed to reason and the authorities generally. It is an old adage, "Actions speak louder than words," and the truth of the maxim is nowhere made more apparent than in cases involving the claim of adverse possession of real property.

In *Lamme v. Dodson*, above, this court said: "The question of adverse possession is one of intention. The intention must be discovered from all the circumstances of the case." The rule, recognized practically everywhere, is aptly stated in 2 Corpus Juris, 128, as follows: "Declarations or assertions by the occupant are not essential to claim of title which may be made by acts alone quite as effectively as by declarations. Customary acts of ownership and control of the land inconsistent with the title and possession of the true owner will suffice, and it has been said that this is the only proof of which a claim of title to a very large proportion of property is susceptible." In 1 R. C. L., p. 704, the same principle is stated, though in somewhat different language, as follows: "If the character of the possession is such that a claim of ownership may be inferred therefrom, and is open and notorious, it is hostile. It is not necessary that one should expressly declare his possession to be hostile, or that his use of

the premises should be such as to indicate at all times a hostile occupancy." (See, also, 2 Wood on Limitations, 4th ed., p. 1229.)

Walsh might have given oral utterance to his purpose, but he might have indulged in levity or been misunderstood, but no sensible person could accuse him of having perpetrated a joke, or could have misunderstood his purpose, when he erected a fence ten feet high to inclose the ground of which he was then in possession. Less positive acts might have been sufficient, but we can scarcely conceive of more emphatic means of expressing an intention to claim and hold property.

In 2 Corpus Juris, 122, it is said: "Every possession is adverse which is not in subservience to the title of another either by a direct acknowledgment or by an open or tacit disavowal of right on the part of the occupant, and it is in the latter case only that the law adjudges the possession of one to the benefit of another." In *Chessman v. Hale*, 31 Mont. 577, 3 Ann. Cas. 1038, 68 L. R. A. 410, 79 Pac. 254, this court said: "In order to obtain a right by prescription, it is necessary that during the prescriptive period an action could have been maintained by the party against whom the claim is made." Apply this rule to the facts of this case. If, as plaintiff claims, the Bohler fence encroaches upon her land, the same encroachment existed from the time her predecessor Parry secured title; and, whatever may be said of the encroachment, so long as Parry's grantor held title to the north half, certain it is that from the time Walsh repaired and extended the fence in 1898, the Parrys had a cause of action against him and his successor which continued until barred by the statute. (*Bullerdick v. Hermismeyer*, 32 Mont. 541, 81 Pac. 334.)

But it is said by respondent that the possession of defendant [5] and his predecessor was held under the mistaken belief that the fence was upon the true boundary line between the north half of lot 1 and the south half, and that plaintiff and her predecessor likewise labored under the same mistake of fact. There is little, if any, evidence to support this view; but, if it be assumed, it does not aid the respondent. There was no agree-

ment nor understanding between the adjoining owners with respect to the dividing line. In 2 Corpus Juris, page 141, the rule is stated succinctly as follows: "Where a person, acting under a mistake as to the true boundary line between his land and that of another, takes possession of land of another believing it to be his own, up to a mistaken line, claims title to it and so holds, the holding is adverse, and, if continued for the requisite period, will give title by adverse possession. And the fact that on taking possession he had no intention of taking what did not belong to him, or claimed that he had no desire or intention to take any land belonging to the adjoining owner, or that he would have surrendered possession if he had known that the land in dispute was not within the calls of his deed, or that the owner of the record title was ignorant of the location of the true boundary line or of the fact that the land was his, or supposed that the adverse occupant intended to claim only what he actually owned, or the fact that both owners were mistaken as to the true boundary line, does not affect the operation of the rule."

In 1 Ruling Case Law, section 48, page 371, the same doctrine is announced as follows: "It has frequently been held that a possession of land which is the result of ignorance, inadvertence, misapprehension, or mistake, will not amount to an ouster of the true owner, and, consequently, will not ripen into title. The great weight of authority, however, is to the effect that an open, notorious, and hostile possession of property for the statutory limitation period is sufficient for the acquisition of title by adverse possession, and that the fact that the possession was taken under a mistake as to boundary lines is immaterial. In other words, the mistake cannot be pleaded in avoidance of the legal effect of the possession." And again in section 50: "The general rule is that where one in ignorance of his actual boundaries takes and holds possession by mistake up to a certain line beyond his limits, upon the claim and in the belief that it is the true line, with the intention to claim title, and thus, if necessary, to acquire 'title by prescription' up to that line, such possession, having the requisite duration and continuity, will ripen into

title.” “Where a person, acting under a mistake as to the true boundary line between his land and that of another, takes possession of land of another, believing it to be his own, up to a mistaken line, claiming title to it and so holding, the holding is adverse, and, if continued for the requisite period, will give title by adverse possession.” (1 Cyc. 1038.) A few of the many decided cases approving these rules are *French v. Pearce*, 8 Conn. 439, 21 Am. Dec. 680; *Metcalf v. McCutchen*, 60 Miss. 145; *Ricker v. Hibbard*, 73 Me. 105; *Walbrunn v. Ballen*, 68 Mo. 164; *Hitchings v. Morrison*, 72 Me. 331; *Woodward v. Faris*, 109 Cal. 12, 41 Pac. 781; *Edwards v. Fleming*, 83 Kan. 653, 33 L. R. A. (n. s.) 923, 112 Pac. 836; *Parker v. Wolf*, 69 Or. 446, 138 Pac. 463; *Wissinger v. Reed*, 69 Wash. 684, 125 Pac. 1030.

In *Jennings v. Gorman*, above, this court, without announcing the rule, referred to the first five cases above and to *Grube v. Wells*, 34 Iowa, 148, for a discussion of the subject and for the enlightenment of the court below upon a retrial of the case.

The evidence shows beyond controversy that defendant acquired title to the strip in controversy by adverse possession.

The judgment and order are reversed and the cause is remanded, with directions to enter judgment in favor of the defendant.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

OLCOTT, RESPONDENT, v. GEBO, APPELLANT.

(No. 3,790.)

(Submitted June 9, 1917. Decided June 26, 1917.)

[166 Pac. 300.]

*Claim and Delivery—Complaint—Sufficiency—Verdict—Insufficiency—Harmless Error.***Claim and Delivery—Complaint—Sufficiency.**

1. The allegation that at all the times mentioned in the complaint "the plaintiff was, continuously has been, and now is, the owner and entitled to the immediate possession" of the chattel in dispute in an action in claim and delivery, was sufficient to meet the requirement that the pleading must show that plaintiff was its owner and entitled to its possession at the time the action was commenced.

Same—Verdict—Insufficiency.

2. Failure of the verdict in an action in claim and delivery to find that defendant wrongfully took and detained the property in question renders it insufficient to sustain a judgment in plaintiff's favor and amounts to a mistrial.

Appeal and Error—Harmless Error.

3. Only those errors and irregularities committed during trial which do not affect the substantial rights of the parties may, under section 6593, Revised Codes, be disregarded on appeal.

Same—Harmless Error.

4. The clause in section 7118, Revised Codes, forbidding reversals of judgments for harmless error, has application only to cases in which the respondent makes cross-assignments upon errors on rulings adverse to him and preserved in a bill of exceptions, in order to enable the appellate court to determine whether those complained of by the appellants were compensated or rendered harmless by reason of them—not to such a one as is referred to in paragraph 2 above.

Appeal from District Court, Carbon County; Geo. W. Pierson, Judge.

ACTION by Edward Olcott against W. H. Gebo. Judgment for plaintiff and defendant appeals. Reversed and remanded.

Messrs. Goddard & Clark, for Appellant, submitted a brief; *Mr. O. F. Goddard* argued the cause orally.

Mr. John G. Skinner and *Mr. Frank P. Whicher*, for Respondent, submitted a brief; *Mr. Whicher* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Claim and delivery. The complaint is in the ordinary form, averring that, plaintiff being the owner, in possession and entitled to the possession of an automobile of the value of \$300, the defendant wrongfully took and detained it. It is also averred that he suffered damage during its detention by defendant in the sum of \$5 per day. The answer consists of a general denial and an affirmative allegation that plaintiff's claim is fraudulent. The plaintiff had verdict and judgment. The defendant has appealed from the judgment and from an order denying him a new trial. The contentions made are that the complaint does not state facts sufficient to constitute a cause of action, that the verdict does not support the judgment, in that it does not respond to all the material issues made by the pleadings, and that the verdict is contrary to the evidence.

1. The criticism of the complaint is that it does not allege that [1] plaintiff was the owner and entitled to the possession of the automobile at the time the action was commenced. The criticism is without merit. The allegation is "that at all the times herein mentioned the plaintiff was, continuously has been, and now is, the owner and entitled to the immediate possession of the automobile." This meets every requirement.

2. The verdict reads as follows: "We, the jury impaneled and sworn to try the above-entitled cause, find that the plaintiff is [2] the owner entitled to the possession of the Buick automobile described in the complaint, and that in case delivery of the same cannot be had, he is entitled to the value thereof, which we find to be in the sum of \$300. We further find that the plaintiff has been damaged by reason of the detention thereof in the sum of \$40."

The contention is that this does not contain a finding upon the material issue whether defendant wrongfully took and detained the automobile. The contention must be sustained. The question here presented has several times heretofore been considered and determined by this court. It is therefore unnecessary to

enter upon a reconsideration of it. The latest discussion of it was in the case of *Hickey v. Breen*, 40 Mont. 368, 20 Ann. Cas. 429, 106 Pac. 881, where all the prior decisions were reviewed and approved. In that case, considering a verdict substantially the same in form as the one before us, Mr. Justice Holloway said: "There is not any finding at all upon the very material issues whether the defendant ever took the property from the plaintiffs, or detained the same. Assuming that the jury's findings as made are correct, still the defendant cannot be mulcted for costs, if he never wrongfully took or detained the property. That a verdict such as the one returned in this action is not sufficient to sustain a judgment has been decided many times." This case was cited as declaratory of settled law in this jurisdiction, in the later case of *Cuerth v. Arbogast*, 48 Mont. 209, 136 Pac. 383. It was pointed out in the case of *Hamilton v. Murray*, 29 Mont. 80, 74 Pac. 75, that the omission of a verdict to find on all the material issues in the case amounts to a mistrial.

Counsel for respondent cite sections 6593 and 7118 of the [3, 4] Revised Codes, and insist that they require the judgment to be sustained notwithstanding the omission. This contention is without merit. The first requires a disregard of those errors and irregularities only which do not affect the substantial rights of the parties. If it had the scope counsel would assign to it, there would never be a successful appeal, for it would include all errors however substantial. The second has no application. It has application only to cases in which the respondent makes cross-assignments upon errors on rulings adverse to him and preserved in a bill of exceptions, in order to enable this court to determine whether those complained of by the appellant were compensated or rendered harmless by reason of them.

3. The plaintiff bases his title upon an alleged sale to him of the automobile by one Darrow. The defendant undertook to justify his taking of it as sheriff under an attachment, as the property of Darrow in an action brought against Darrow by a creditor, on the ground that the sale had not been accompanied by an immediate delivery and followed by an actual and con-

tinued change of possession as required by the statute. (Rev. Codes, sec. 6128.) As to this contention it is sufficient to say that, while the evidence of the sale and change of possession as it appears in the record is not satisfactory, it presented a case for the jury as to the credibility of the witnesses, which it was their exclusive province to determine.

The judgment and order are reversed and the district court is directed to grant a new trial.

Reversed and remanded.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

ARMITAGE, RESPONDENT, v. CHICAGO, MILWAUKEE
& ST. P. RY. CO., APPELLANT.

(No. 3,787.)

(Submitted June 9, 1917. Decided June 28, 1917.)

[166 Pac. 301.]

Personal Injuries—Railroads—Master and Servant—Failure of Proof—Variance—Safety Appliances Acts—Duty of Carrier—Excessive Verdict.

Personal Injuries—Railroads—Master and Servant—Failure of Proof—Variance.

1. The complaint in an action against a railroad company charged that the defendant negligently, recklessly and carelessly caused and permitted the braking appliance and the chains, mechanisms and fastenings on a certain freight-car to become defective, etc., and that this negligence was the proximate cause of plaintiff's injury. The evidence was that the car was equipped with hand-brakes, and that a part of the equipment was a chain connecting two parts of the mechanism, which, instead of being over a hook, was lashed to the under side of it by means of rusty bailing wire, and that it was this wire which broke and caused plaintiff's fall and consequent injury, *Held*, that, as the wire served the purpose of a connecting link between the chain and brake rod, it was fairly comprehended within the general descriptive terms employed in the complaint, and there was no failure of proof or fatal variance.

Same—Federal Safety Appliance Acts—Duty of Carrier.

2. The Federal Safety Appliance Acts, *held* to impose upon the carrier an absolute duty not only to equip its cars with the prescribed appliances, but also to maintain such appliances in a secure condition.

Same—Excessive Verdict—What is not.

3. Where it appeared from plaintiff's evidence—in sharp conflict with that of defendant—that plaintiff suffered a severe rupture, which permits the intestines to come down into the scrotum on the left side; that he sustained an injury to the back, which affected the nerves branching off from the lower portion of the spinal column; that this injury was of such severity that there was discoloration and swelling on the back at the time of the trial, more than six months after the injury; and that as a result of such injury plaintiff has been rendered sexually impotent; is very nervous, and has lost much sleep; and that at the time of the accident he was an able-bodied man forty-one years of age, with more than twenty years' experience as a railroad man, was a brakeman and extra conductor earning \$115 a month as brakeman, had an expectancy in life of 27 years, has been unable to work since the accident, and that the injury to his nervous system is permanent and will probably be progressive, a verdict for \$6,000, *held* not so large as to indicate passion or prejudice on the part of the jury.

[As to what is excessive verdict in action for personal injuries, see note in *Ann. Cas.* 1913A, 1361.]

Appeal from District Court, Gallatin County; Ben B. Law, Judge.

ACTION by W. O. Armitage against the Chicago, Milwaukee & St. Paul Railway Company. From a judgment for plaintiff, and from an order denying its motion for a new trial, defendant appeals. Affirmed.

Mr. E. M. Hall and *Mr. W. S. Hartman*, for Appellant, submitted a brief; *Mr. Hartman* argued the cause orally.

Appellant contends that where the interstate carrier has complied with the rulings and orders of the Interstate Commerce Commission in furnishing and equipping its car with a safe and efficient hand-brake, the only duty then devolving upon it is that of exercising ordinary care to inspect and detect defects in the appliance and remedy the same. We contend that the lower court erred in this holding that the duty devolving upon the carrier was absolute, not only to furnish the appliance prescribed by the commission in the first instance, but to keep it absolutely safe and in good repair, and that a careful examination of the Safety Appliance Acts and the Employers' Liability Act of April 22, 1908, as amended by the Act of April 5, 1910, will disclose that error. It supersedes the entire body of the law in the various states where there has been an injury sustained by an

employee of an interstate carrier while engaged in interstate commerce. The authorities are unanimous in declaring this to be the purpose and effect of the Act whenever the evidence shows the employee engaged in interstate commerce at the time of his injury, even though his action was commenced under some other Act or rule of law. (*Toledo, St. L. & W. R. Co. v. Slavin*, 236 U. S. 454, 59 L. Ed. 671, 35 Sup. Ct. Rep. 306; *Melzner v. Northern Pac. Ry. Co.*, 46 Mont. 277, 127 Pac. 1002; *State v. Harper*, 48 Mont. 456, Ann. Cas. 1915D, 1017, 51 L. R. A. (n. s.) 157, 138 Pac. 495; *Chicago, B. & Q. R. Co. v. Miller*, 226 U. S. 513, 57 L. Ed. 323, 33 Sup. Ct. Rep. 155; *Northern Pac. R. Co. v. Washington*, 222 U. S. 370, 56 L. Ed. 237, 32 Sup. Ct. Rep. 160; *Southern Ry. Co. v. Reid*, 222 U. S. 424, 56 L. Ed. 257, 32 Sup. Ct. Rep. 140; *Oberlin v. Oregon W. R. & Nav. Co.*, 71 Or. 177, 142 Pac. 554; *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. Rep. 169, 38 L. R. A. (n. s.) 44, 1 N. C. C. A. 875; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, Ann. Cas. 1914C, 159, 58 L. Ed. 591, 34 Sup. Ct. Rep. 305, 9 N. C. C. A. 109; *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, Ann. Cas. 1915B, 475, L. R. A. 1915C, 1, 58 L. Ed. 1062, 1063, 34 Sup. Ct. Rep. 635, 8 N. C. C. A. 834.)

In the *Horton Case*, *supra*, the court unmistakably holds that the cause of action by the Act conferred upon the employee against the carrier is for injuries due to its negligence, and that "the plain effect of these words is to condition the liability upon negligence; and had there been doubt before as to the common-law rule, certainly the Act now limits the responsibility of the company as indicated." Since the decision in the *Horton Case*, the federal supreme court has not had the question involved in this discussion squarely presented to it, but it has decided two cases for personal injuries to employees engaged in interstate commerce, which, though not in point, are interesting enough to be noted in this connection. The first of these is *St. Louis & S. F. R. Co. v. Conarty*, 238 U. S. 243, 59 L. Ed. 1290, 35 Sup. Ct. Rep. 785; the other is *Great Northern R. Co. v. Otos*, 239 U. S. 349, 60 L. Ed. 322, 36 Sup. Ct. Rep. 124, decided December 13,

1915. In the first of these the contention of counsel that the carrier was liable for all injuries that the defective and unlawful condition of the car in question there directly caused, or contributed to cause, the injured employee, was held not well taken. In the second it is held that when the carrier has discovered the defective appliance and still uses it in interstate commerce, and an employee is injured by the use of it, there is an absolute liability which cannot be defeated by proof of contributory negligence. *Canadian Northern R. Co. v. Senske*, 201 Fed. 637, 120 C. C. A. 65, though not directly in point, is interesting in that it is decided on December 24, 1912, by the circuit court of appeals for the eighth circuit, and, so far as the facts in evidence are concerned, is substantially on all-fours with the case at bar. There the car had been inspected shortly before the accident at the usual place and in the usual manner, and the defective condition of the handhold had not been disclosed by the inspection. The court held that a directed verdict should have been granted, and that where a carrier had exercised that degree of care which persons of ordinary intelligence and prudence engaged in the same kind of business commonly exercised in like circumstances, there is no actionable negligence. The same rule of law is quoted with approval in *Forquer v. Slater Brick Co.*, 37 Mont. 426, 97 Pac. 843; *Kinsel v. North Butte Mining Co.*, 44 Mont. 445-470, 120 Pac. 797; *Westlake v. Keating Gold Mining Co.*, 48 Mont. 120-135, 136 Pac. 38.

In the light of the authorities above cited, it would seem that the court below could only have held as it did, on the point in question, by applying the doctrine of *res ipsa loquitur*. But that doctrine is not applicable to negligence cases arising between master and servant. (*Canadian Northern Ry. Co. v. Senske, supra*; *Montbriand v. Chicago, St. P., M. & O. Ry. Co.*, 191 Fed. 988; *Reed v. Norfolk & W. Ry. Co.*, 162 Fed. 750; *Midland Valley R. Co. v. Fulgham*, 181 Fed. 91, 104 C. C. A. 151; *Patton v. Texas & P. Ry. Co.*, 179 U. S. 658, 45 L. Ed. 361, 21 Sup. Ct. Rep. 275; *Phoenix Printing Co. v. Durham*, 32 Okl. 575, 38 L. R. A. (n. s.) 1191, 122 Pac. 708; *Christensen v. Ore-*

gon Short Line R. R. Co., 35 Utah, 137, 18 Ann. Cas. 1159, 20 L. R. A. (n. s.) 255, 99 Pac. 676; *Acme Cement Plaster Co. v. Westman*, 20 Wyo. 143, 122 Pac. 89; *Texas & Pac. Ry. Co. v. Barrett*, 166 U. S. 617, 41 L. Ed. 1136, 17 Sup. Ct. Rep. 707; 4 Labatt on Master and Servant, 2d ed., sec. 1600.)

Mr. C. E. Carlson and *Messrs. Dunn & Carlson*, for Respondent, submitted a brief; *Mr. C. E. Carlson* argued the cause orally.

The statutes involved are as follows: Act March 2, 1893, Chap. 196, 27 Stats. at Large, 531; Act March 2, 1903, 32 Stats. at Large, 943; Act April 14, 1910, 36 Stats. at Large, 298, 299. The foregoing Acts are known as the Safety Appliance Acts: Act of April 22, 1908, 35 U. S. Stat. 65, known as the Employers' Liability Act. It is apparent that running all through these Acts there has been a definite policy upon the part of Congress wherever it has required the railroad companies to furnish safe and efficient appliances for the protection of employees to make that duty absolute. It was so provided in the Act of 1893 and the Acts amendatory thereof, and the liability to employees under these Acts was carefully preserved by Congress under section 8 of the Employers' Liability Act of 1908, and the same provision will be found in section 5 of the Employers' Liability Act of June 11, 1906, being the prior Act which was held unconstitutional. The same policy is evinced in the Act of 1910. Respondent cites *Seaboard Air Line v. Horton*, 233 U. S. 492, Ann. Cas. 1915B, 475, L. R. A. 1915C, 1, 58 L. Ed. 1062, 34 Sup. Ct. Rep. 635, 8 N. C. C. A. 834. The plaintiff in that case was injured by the explosion of an unguarded water-gauge upon defendant's locomotive engine. The case arose in North Carolina. The court had instructed the jury that if the guard was a proper safety provision for use upon the gauge, and if it was unsafe without it, the defendant was guilty of negligence. The court in its opinion laid down the rule that by the passage of the Employers' Liability Act of 1908 Congress had covered the field of the liability of master and servant in interstate commerce cases, and that the rule of liability as applied to that case was fixed

by the provision of that Act—that the instruction was erroneous because it was based upon a state statute which had been superseded by the Act of Congress and that under that Act negligence of the master must be shown in situations such as this particular case. It will be observed that the *Horton Case* did not arise under the Safety Appliance Acts; that no statute of the United States had been passed which by any stretch of the imagination could apply to a water-gauge upon a locomotive. The court says so in its opinion. Counsel intimate that the water-gauge in the *Horton Case* was covered by the Federal Boiler Inspection Act of February 17, 1911 (36 Stats. at Large, 913). The accident in the case occurred on August 4, 1910. The Federal Boiler Inspection Act was passed on February 17, 1911, and did not become effective until July 1, 1911, nearly a year after the accident in the *Horton Case*. (Act Feb. 17, 1911.) It therefore follows that upon the facts in the *Horton Case* the effect of the Employers' Liability Act of 1908, if any, upon the scope and force of the Federal Safety Appliance Acts was not involved in the decision of that case. Had a decision been made upon the question in the *Horton Case*, it would clearly have been *obiter*.

Numerous cases have arisen and been decided in the various courts of the land including the supreme court of the United States, where the plaintiff's cause of action was based both upon the Employers' Liability Act of 1908 and the Safety Appliance Acts. We shall advert to only a few: *Grand Trunk Western R. Co. v. Lindsay*, 233 U. S. 42, Ann. Cas. 1914C, 168, 58 L. Ed. 838, 34 Sup. Ct. Rep. 581; *Southern Ry. Co. v. Crockett*, 234 U. S. 725, 58 L. Ed. 1564, 34 Sup. Ct. Rep. 897; *American R. Co. v. Didricksen*, 227 U. S. 145, 57 L. Ed. 456, 33 Sup. Ct. Rep. 224; *Burho v. Minneapolis & St. L. R. Co.*, 121 Minn. 326, 141 N. W. 300; *La Mere v. Railway Transfer Co.*, 125 Minn. 159, Ann. Cas. 1915C, 667, 145 N. W. 1068; *Smith v. Atlantic Coast Line R. Co.*, 210 Fed. 761, 762, 127 C. C. A. 311; *Parker v. Atlantic City R. Co.*, 87 N. J. L. 148, 93 Atl. 574 (action under Safety Appliance Act and Employers' Liability Act—specific defect; automatic coupling. Court holds squarely that Safety Appli-

ance Act applied and that it is negligence *per se* for the couplers to fail to comply at any time. Case on all-fours with this case); *Missouri, K. & T. Ry. Co. v. Barrington* (Tex. Civ.), 173 S. W. 595 (defective handhold. Action under Employers' Liability Act and Safety Appliance Act of April 14, 1910. Specifically held that the common-law rule does not apply, and the rule of absolute liability under the Safety Appliance Act applies); *Missouri, O. & G. Ry. Co. v. Plemmons* (Tex. Civ.), 171 S. W. 259 (action under Safety Appliance Act and Employers' Liability Act. *Held*, duty is absolute); *St. Louis & S. F. Ry. Co. v. Conarty*, 238 U. S. 243, 59 L. Ed. 1290, 35 Sup. Ct. Rep. 785; *Great Northern Ry. Co. v. Otos*, 239 U. S. 349, 60 L. Ed. 322, 36 Sup. Ct. Rep. 124.

The language of the Employers' Liability Act, "by reason of any defect or insufficiency due to its negligence in its cars," *etc.* (sec. 1), includes all species of negligence, and it is held by numerous decisions of the land that the violation of a statute enacted for the protection of a particular class is negligence *per se*. If it is negligence *per se* it is necessarily negligence within the language of section 1 of the Employers' Liability Act. (*La Mere v. Railway Transfer Co.*, *Smith v. Atlantic Coast Line R. Co.*, *Grand Trunk W. R. Co. v. Lindsay*, *supra*; *Chicago, R. I. & P. R. Co. v. Brown*, 229 U. S. 317, 57 L. Ed. 1204, 33 Sup. Ct. Rep. 840, 3 N. C. C. A. 826.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On December 2, 1914, the defendant, an interstate carrier, brought its east-bound freight train No. 74 into the yards at Harlowton, placed it upon a side-track, and cut off the locomotive. It was necessary to hold the cars by means of the hand-brakes, and the plaintiff, head brakeman upon the train, in the discharge of his duties undertook to set the brakes upon car No. 61,981, but the brake mechanism gave way and plaintiff was injured. He brought this action to recover damages and prevailed in the lower court. The defendant has appealed from the judg-

ment and from an order denying its motion for a new trial. The specifications of error are presented in four contentions.

1. It is insisted that there is a variance between the allegations of negligence and the proof, which amounts to a failure of proof. It is charged in the complaint that the defendant "negligently, recklessly and carelessly suffered, caused and permitted the said braking appliance, and the chains, mechanisms and fastenings thereon [on car 61,981] to be and become defective, old, battered, worn, out of repair, broken and weak, and made of insufficient and improper material," and that this negligence was the proximate cause of plaintiff's injury. The evidence discloses that the car was equipped with hand-brake appliances, consisting, among other things, of the brake staff, wheel, and ratchet, a chain attached to the staff, which passes over a pulley and back under the car to a reach-rod, which in turn is attached to an equalizer lever. The front end of the reach-rod is bent upward and back, forming a large hook, and the design of the equipment is that the chain shall be fastened to this rod by having the last link placed over the hook. It is the theory of plaintiff's case, supported by his testimony, that instead of the chain and rod being connected, as they were intended to be, the last link of the chain was not over and about the hook, but was lashed to the underside of it by means of some old, rusty baling wire, and that it was this wire which broke and caused plaintiff's fall and consequent injury. The wire served the purpose of a connecting link between the chain and reach-rod, and in our opinion is fairly comprehended within the general descriptive terms employed in the complaint. It is only when a particular claim or defense is unproved in its general scope and meaning that it can be said that there is a failure of proof, or a fatal variance, as it is commonly miscalled. (Sec. 6587, Rev. Codes.) The complaint is laboriously prolix, but the rules of pleading and practice are now very liberal. Section 6585, Revised Codes, provides: "No variance between the allegation in a pleading and the proof is to be deemed material, un-

less it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits.”

2. It is contended that the verdict is against the law as declared in the court's instructions 8, 9 and 10. Instructions 9 and 10 relate to the burden of proof and to the *quantum* of proof necessary to warrant a verdict for the plaintiff. We are satisfied that there was sufficient evidence to justify a submission of the case to the jury, and that neither of these instructions was disregarded. Instruction 8 will be considered in connection with the next assignment.

3. This action was brought under the Federal Employers' [2] Liability Act of April 22, 1908 (35 Stats. at Large, 65, Chap. 149), and the Safety Appliance Acts of March 2, 1893 (27 Stats. at Large, 531, Chap. 196), March 2, 1903 (32 Stats. at Large, 943, Chap. 976), and April 14, 1910 (36 Stats. at Large, 298, Chap. 160). The last-mentioned Act requires that all cars subject to the provisions of the Act must be equipped with "efficient hand-brakes." It is now settled beyond controversy that these Safety Appliance Acts impose upon the carrier an absolute duty (1) to equip its cars with the prescribed appliances, and (2) to maintain such appliances in a secure condition. (*St. Louis, I. M. & S. Ry. Co. v. Taylor*, 210 U. S. 281, 52 L. Ed. 1061, 28 Sup. Ct. Rep. 616; *Chicago B. & Q. Ry. Co. v. United States*, 220 U. S. 559, 55 L. Ed. 582, 31 Sup. Ct. Rep. 612; *Delk v. St. Louis & San Francisco R. R. Co.*, 220 U. S. 580, 55 L. Ed. 590, 31 Sup. Ct. Rep. 617; *Texas & Pac. Ry. Co. v. Rigsby*, 241 U. S. 33, 60 L. Ed. 874, 36 Sup. Ct. Rep. 482.)

Under instructions of the court, the jury, in response to special interrogatories, found in effect that the reach-rod and chain met the requirements of the Federal Acts and the regulations of the Interstate Commerce Commission, if the chain had been hooked over the end of the rod as intended; and it is now the contention of appellant that it did not violate the law, even though some one wrongfully connected the chain and rod by means of the baling wire which would not withstand the force necessary to set the brakes. Counsel for appellant epito-

mize this contention as follows: "All that is required is that the brake-rod and chain be constructed according to the design and requirements of the Interstate Commerce Commission, so they can be hooked together in the usual manner for the proper operation of the appliance. * * * The perfect braking appliance did not become inefficient or unsafe because someone went to the trouble of wiring the link on the end of the brake-chain to the hook on the end of the brake-rod."

While no one of the cases cited above involved a state of facts similar to the facts of the case before us, yet, as we understand the construction placed upon the Safety Appliance Acts by those cases, the principle involved in each of them is the same as that presented in this instance. Certainly it could not be contended that if car No. 61,981 had been turned out of the shops with the hand-brake appliances loaded on the car, there would have been a compliance with section 2 of the Act of 1910, even though each component part was in perfect condition. Neither, in our opinion, would the requirements of the Act have been met if the defendant in the first instance, in adjusting these appliances to the car, had deliberately fastened the chain to the rod by means of an old rusty wire which would not withstand the strain necessary to set the brakes. The Act clearly requires that the carrier shall not only furnish the necessary parts of the braking apparatus, but it shall furnish them so properly adjusted and connected that the brake will be efficient in the condition in which the car is turned over to the employee. To make a more concrete application: The absolute duty was imposed upon defendant to furnish this car with the several parts of the hand-braking appliances so securely connected that the brakes could be set with safety in the ordinary routine of a brakeman's duties. If it was necessary to that result that the chain be hooked over the end of the rod, then the duty was imposed upon the carrier to see that such connection was made in the first instance.

As we understand the decisions in the cases above cited, the same high standard of duty is imposed upon the carrier to main-

tain the appliances in a secure condition as is imposed upon it to furnish the equipment in the first instance; and if this be correct—and we think it is—then there was imposed upon this defendant an absolute duty to see that the chain and rod were connected securely at all times, and its failure to do so constitutes a breach of its statutory duty.

Instruction 8 is couched in language whose meaning is very obscure; but, assuming that counsel for defendant, who proposed and secured the trial court to give it, understand its meaning, we adopt their interpretation. In their brief they say: "Instruction No. 8 told the jury that the Safety Appliance Laws, or the orders of the Interstate Commerce Commission, did not prescribe the manner of fastening the brake-chain on to the brake-rod, or what kind of a link or hook should be used, and that appellant was not bound to select the best or safest appliance, nor the best method of its operation, and if at the time of its selection, hooking the chain over the gooseneck on the end of the rod was generally used in fastening the brake-rod and chain together, and was reasonably adapted to the purpose, and kept at all times in reasonably safe, efficient and suitable condition for the servant to do his work, appellant had discharged its duty and was not liable." If the instruction has any meaning or any application to the facts of this case, it must be held to state that the carrier discharged its duty under the laws and regulations of the Interstate Commerce Commission, if it equipped the car with proper hand-braking appliances, consisting, among other things, of the chain hooked over the end of the rod, and kept such appliances at all times in a reasonably safe, efficient and suitable condition for the servant to do his work. Under the evidence that the proper method of connecting the chain and rod was by hooking the end link of the chain over the hook on the rod, the jury must have understood that the carrier's duty could be discharged only by providing these parts properly connected and by keeping them connected in a reasonably safe, efficient and suitable condition for the servant's use. If this is not the meaning of the instruc-

tion, we are at a loss to understand it. If it is the meaning, then it correctly measures the carrier's duty as stated above, and the verdict is not contrary to it, for the evidence offered by plaintiff discloses that the carrier did not keep the chain and rod connected in a safe, efficient and suitable manner for the servant's use. There is not any evidence that plaintiff connected the rod and chain by means of the wire.

4. It is contended that the verdict for \$6,000 is so excessive [3] as to indicate that it was given under the influence of passion and prejudice. That the plaintiff suffered some injury is not disputed, but the extent of the injury is the subject of controversy. That there is a sharp conflict in the evidence upon this question cannot be gainsaid. If the jurors believed the testimony of Drs. Blair, Crabbe, Judd and Willard, their verdict cannot be justified; but they were at liberty to refuse to believe it, and apparently exercised their prerogative accordingly. From the testimony of the plaintiff, his wife, and Dr. Seitz, the jury could draw the legitimate inferences that plaintiff suffered a severe rupture, which permits the intestines to come down into the scrotum on the left side; that he sustained an injury to the back, which affected the nerves branching off from the lower portion of the spinal column; that this injury was of such severity that there was discoloration and swelling on the back at the time of the trial, more than six months after the injury; that as a result of the injury he has been rendered sexually impotent; that he is very nervous and has lost much sleep; that at the time of the accident he was an able-bodied man, forty-one years of age, with more than twenty years' experience as a railroad man, was a brakeman and extra conductor earning \$115 per month as a brakeman, had an expectancy in life of twenty-seven years, and had been unable to pursue his work after the accident and up to the time of the trial. There is some evidence also to justify the inference that the injury to his nervous system is permanent and will probably be progressive. While subsequent events may demonstrate that the jurors were exceedingly liberal in their allowance, the amount

of the verdict, in the light of the evidence, is not so large as to shock the conscience, and we do not feel justified in substituting our judgment for that of the jury.

The judgment and order are affirmed.

'Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

JARRETT ET AL., RESPONDENTS, v. HART, APPELLANT.

(No. 3,774.)

(Submitted June 11, 1917. Decided June 29, 1917.)

[167 Pac. 695.]

Judgments—Orders—Appeals—Dismissal.

1. An appeal from a final judgment not taken within one year after entry will be dismissed, as will also an appeal from an order made after final judgment, if not taken within sixty days after it is made and entered in the minutes.

Appeals from District Court, Musselshell County; Chas. L. Crum, Judge.

ACTION by W. G. Jarrett and others against Jim Hart. From a judgment in favor of plaintiffs and several orders made after final judgment, defendant appeals. Dismissed.

Mr. C. L. Harris, for Appellant, submitted a brief and argued the cause orally.

Mr. Thos. J. Mathews, for Respondents, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The notice of appeal herein is as follows:

“You will please take notice that Jim Hart, one of the parties to the above-entitled action, hereby appeals to the supreme court of the state of Montana, from the judgment therein entered, in

said district court, on the 30th day of April, 1914, in favor of the petitioners named in said action and against said Jim Hart, and from the whole thereof; and also from an order refusing to modify said decree, made and entered in said court on the 5th day of May, 1915; and also from an order denying the application of Jim Hart to vacate and set aside the findings of the arbitrator and surveyor, and to vacate the decree and to dismiss the proceedings aforesaid, made and entered in said court on the 5th day of May, 1915.

“Dated this 23d day of October, 1915.

“C. L. HARRIS,
“Attorney for Jim Hart.

“Filed Oct. 23, 1915.

“Service of foregoing notice of appeal and receipt of copy hereof acknowledged this 23d day of October, 1915.

“THOMAS MATHEWS,
“Attorney for Petitioners.”

This court has not any jurisdiction of these appeals. An [1] appeal from a final judgment must be taken within one year after the entry of judgment (subd. 1, sec. 7099, Rev. Codes). An appeal from an order made after final judgment must be taken within sixty days after the order is made and entered in the minutes (subd. 3, sec. 7099). An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered a notice stating the appeal from the same or some specific part thereof, and serving a similar notice on the adverse party or his attorney. (Sec. 7100, Rev. Codes.)

The notice of appeal discloses that the appeal from the judgment was taken more than seventeen months after the judgment was entered; and that the appeals from the orders were taken more than five months after the orders were made and entered in the minutes. The appeals are accordingly dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

Rehearing denied October 3, 1917.

STATE, RESPONDENT, v. HOPKINS, APPELLANT.

(No. 3,980.)

(Submitted June 12, 1917. Decided July 2, 1917.)

[166 Pac. 304.]

*Osteopathy—Chiropractic—Practicing Without License—Constitutional Law—Statutes—Title—Class Legislation—Liberty of Occupation—Monopolies—Information—Evidence.**Osteopathy—Chiropractic—Constitution—Statutes—Defective Title.*

1. *Held*, in a prosecution of a chiropractor for practicing osteopathy without first obtaining a license, that the statute under which the prosecution was had (Rev. Codes, secs. 1594–1606), is not repugnant to section 23, Article V of the state Constitution on the ground, as claimed, that there is nothing in the titles of the Acts constituting the statute regulating the practice of osteopathy indicating an intention to include “chiropractic”; the latter, like the former, having to do with the art of healing by the use of the hands, falls within the definition of “osteopathy,” and must be held to have been intended as included within it.

[As to statutes regulating the practice of medicine and to whom they are applicable, see note in 98 Am. St. Rep. 742.]

Same—Constitution—Class Legislation.

2. *Held*, further, that the provisions of the statute above are not invalid as arbitrary and unreasonable class legislation contrary to section 1 of the Fourteenth Amendment to the Constitution of the United States, guaranteeing the equal protection of the laws, the contention that the legislation permits a licensed practitioner of medicine or surgery to practice osteopathy without procuring a license, whereas it prohibits every one else from doing so, being untenable.

Same—Denial of Right to Engage in Occupation.

3. The statute above (Rev. Codes, secs. 1594–1606) *held* not to make an arbitrary classification denying the right of citizens to engage in a lawful occupation, and therefore not an abuse of the police power of the state.

Same—Chiropractic—Examination—Not Unreasonable Requirement.

4. Chiropractic being osteopathy under another name, the requirement that before a chiropractor may be permitted to practice he shall be examined upon the theory and practice of osteopathy is not unreasonable.

Same—Monopolies.

5. Since under the Osteopathic Practice Act anyone possessing the necessary qualifications prescribed to engage in the practice of healing by the use of the hand, whether he style himself “osteopath” or “chiropractic,” may engage in the practice and earn his livelihood by this means, upon securing a license, it is not objectionable as conferring a monopoly on the school of osteopathy.

Same—Practicing Without License—Evidence.

6. The record of the names of applicants for license, required by section 1595, Revised Codes, to be kept by the secretary of the board of osteopathic examiners, showing that defendant had never applied for a license or temporary certificate was, in the absence of contradic-

tion, sufficient to support the charge that he had been practicing without a license.

Same—Information—Negating Exception.

7. An information charging one with practicing osteopathy without first obtaining a license need not allege that he had not procured a temporary certificate permitting him to practice, this being a matter of defense.

Same—Physicians and Surgeons—License—Evidence.

8. Assuming (but not deciding) that an information charging the practice of osteopathy without a license must set forth that defendant was not a duly licensed practitioner of medicine or surgery, failure of the register of applicants to the board of medical examiners for certificate to practice required by section 1586, Revised Codes, to be kept by the board and made *prima facie* evidence of all matters therein recorded, to show that defendant had applied for license, was sufficient evidence that he had not been licensed to practice medicine or surgery.

Appeal from District Court, Lewis and Clark County; R. Lee Word, Judge.

W. H. HOPKINS was convicted of a misdemeanor committed by practicing osteopathy without obtaining a license, and appeals from the judgment and an order denying him a new trial.

Mr. Wellington D. Rankin, for Appellant, submitted a brief and argued the cause orally.

If the legislative intent was to include within the meaning of sections 1594–1606 of our Political Code one who is engaged as a chiropractor, then to that extent the sections are unconstitutional because repugnant to Article V, section 23 of the Constitution of the state of Montana. There was nothing in the title of the Act regulating the practice of osteopathy, when originally enacted, to indicate that it was intended to affect “chiropractors.” The testimony shows that the defendant held himself out as a chiropractor and not as one engaged in the practice of osteopathy. The relief was not administered by any manipulation of the body or any of its parts, but by placing one hand on the back and striking it with the other. Adjustment of the vertebrae by a chiropractor is accomplished by a direct thrust and not by manipulation of the body. “Chiropractic” differs from all other methods and systems of treatment and is a separate, distinct and systematized profession. The language of Judge West in his dissenting opinion in the

case of *State v. Johnson*, 84 Kan. 411, 41 L. R. A. (n. s.) 539, 114 Pac. 390, is pertinent here.

The information alleged that the defendant was not a physician or surgeon, and, of course, this was a necessary and material allegation and one which should have been proved beyond a reasonable doubt before a conviction could be had. (*State v. Brand*, 153 Mo. App. 27, 131 S. W. 923; *State v. Schweiter*, 27 Kan. 499; *State v. Hellscher*, 150 Mo. App. 230, 129 S. W. 1035; *State v. Carlisle*, 22 S. D. 529, 118 N. W. 1033.) In fact, the court instructed the jury that before they could find the defendant guilty, they must find that the defendant was not a physician or surgeon licensed under the laws of Montana. The record fails to show that the defendant was not such a physician, and therefore the motion for a directed verdict should have been granted.

The statutes governing the practice of osteopathy are unconstitutional and void because repugnant to the Fourteenth Amendment to the Constitution of the United States.

(A) It is unreasonable class legislation denying to osteopaths the equal protection of the laws. By reason of the proviso in the Act a legally licensed physician is privileged to practice osteopathy without a license so to do, in so far as the treatment of his patients in the practice of his profession involves the treatment or manipulation or method of manipulating a human body or any of its limbs, muscles or parts, by the use of the hands or mechanical appliances. It clearly is unreasonable class legislation, and denying to those, not legally licensed physicians, who desire to practice osteopathy the equal protection of the laws. (See *State v. Dodd*, 51 Mont. 100, 149 Pac. 481.)

(B) It is an arbitrary classification denying the right to engage in a lawful occupation, and is an abuse of the police power of the state. (*Dent v. West Virginia*, 129 U. S. 114, 32 L. Ed. 623, 9 Sup. Ct. Rep. 231; *State v. District Court*, 26 Mont. 121, 66 Pac. 754.)

(C) It is an attempt to restrict all healing of the drugless cults to a single school, and thereby confer a monopoly upon the osteopaths. (*State v. Biggs*, 133 N. C. 729, 98 Am. St. Rep. 731, 64 L. R. A. 139; *State v. McKnight*, 131 N. C. 717, 59 L. R. A. 187, 42 S. E. 580; *Nelson v. State Board of Health*, 22 Ky. Law Rep. 438, 57 S. W. 501; *Post v. United States*, 135 Fed. 1, 70 L. R. A. 989, 67 C. C. A. 569.)

Mr. S. C. Ford, Attorney General, *Mr. Frank Woody*, Assistant Attorney General, and *Mr. Joseph P. Donnelly*, for Respondent, submitted a brief; *Mr. Donnelly* argued the cause orally.

The United States supreme court and the courts of last resort in various states have almost without exception upheld the power of the legislature to pass laws of this kind, and have called attention in no uncertain terms to the great need of protection of the afflicted from incompetence, ignorance and quackery, and of the poor from avarice and unscrupulous greed for gain. (*People v. Reetz*, 127 Mich. 87, 86 N. W. 396; *Reetz v. Michigan*, 188 U. S. 505, 47 L. Ed. 563, 23 Sup. Ct. Rep. 390; *Dent v. West Virginia*, 129 U. S. 114, 32 L. Ed. 623, 9 Sup. Ct. Rep. 231; *Hawker v. New York*, 170 U. S. 189, 42 L. Ed. 1002, 18 Sup. Ct. Rep. 573; *Bragg v. State*, 134 Ala. 165, 58 L. R. A. 925, 32 South. 767; *Parks v. State*, 159 Ind. 211, 59 L. R. A. 190, 64 N. E. 862; *State ex rel. Burroughs v. Webster*, 150 Ind. 607, 41 L. R. A. 212, 50 N. E. 750; *State v. Adkins*, 145 Iowa, 671, 124 N. W. 627; *State v. Wilhite*, 132 Iowa, 226, 11 Ann. Cas. 180, 109 N. W. 730; *People v. Gordon*, 194 Ill. 560, 88 Am. St. Rep. 165, 62 N. E. 858; *Scholle v. State*, 90 Md. 729, 50 L. R. A. 411, 46 Atl. 326; *Little v. State*, 60 Neb. 749, 51 L. R. A. 717, 84 N. W. 248; *State v. Marble*, 72 Ohio St. 21, 106 Am. St. Rep. 570, 2 Ann. Cas. 989, 70 L. R. A. 835, 73 N. E. 1063; *State v. Yegge*, 19 S. D. 234, 9 Ann. Cas. 202, 69 L. R. A. 504, 103 N. W. 17; *Ex parte Collins*, 57 Tex. Cr. 2, 121 S. W. 501; *Brooks v. State*, 88 Ala. 122, 6 South. 902; *O'Neil v. State*, 115 Tenn. 427, 3 L. R. A. (n. s.) 762, 90 S. W. 627; *Witty v. State*, 173 Ind.

404, 25 L. R. A. (n. s.) 1297, 90 N. E. 627; *Commonwealth v. Jewelle*, 199 Mass. 558, 85 N. E. 858; *State v. Pollman*, 51 Wash. 110, 98 Pac. 88; *State v. Oredson*, 96 Minn. 509, 105 N. W. 188; *Germany v. State*, 62 Tex. Cr. 276, Ann. Cas. 1913C, 477, 137 S. W. 130; *State v. Doerring*, 194 Mo. 398, 92 S. W. 489; *State v. Greiner*, 63 Wash. 46, 114 Pac. 897; *State v. Smith*, 233 Mo. 242, 33 L. R. A. (n. s.) 179, 135 S. W. 465; *State v. Dodd*, 51 Mont. 100, 149 Pac. 481.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant was convicted of a misdemeanor committed by engaging in the practice of osteopathy "under and by the name of chiropractic or chiropractor" for compensation without first having obtained a license from the state board of osteopathic examiners. He has appealed from the judgment and an order denying him a new trial.

1. The first contention is that the conviction cannot be sustained because, if it was the intention of the legislature, in enacting the provisions of the Revised Codes relating to the practice of osteopathy, to include in their meaning one engaged in practicing of healing as a chiropractor, they are repugnant to section 23, Article V, of the Constitution of Montana, and therefore void in this: That there is not found in the title of the bills by which these provisions were enacted any mention of chiropractors or those engaged in the practice of chiropractic. A brief history of this legislation will be found in *State v. Dodd*, 51 Mont. 100, 149 Pac. 481. By reference to the Acts of 1905 (Laws 1905, Chap. 51, p. 106), and 1907 (Laws 1907, Chap. 112, p. 283) the purpose of the legislature becomes apparent. The Act of 1905 supplanted the original Act of 1901 on the same subject. Neither of these defined the term "osteopathy" or the expression "practicing osteopathy," the legislature assuming that both the term and the expression were well understood and did not include the practice of medicine or surgery. The purpose of the Act of 1907 was to amend sections 8 and 12 of the

law of 1905 by increasing the penalty for a violation of it, and to define specifically the expression "practicing osteopathy" in order to indicate clearly the meaning of it and to distinguish it from the practice of medicine or surgery which are regulated by other provisions on the subject. (Rev. Codes, secs. 1585-1593.) The Acts of 1905 and 1907 appear in the Revised Codes as sections 1594-1606, inclusive; sections 1601 and 1605 being the amended sections. Upon a comparison of the definition of the expression "practicing osteopathy" found in section 1605 with the accepted definition of the expression "practicing chiropractic," it is clear that the practice of the latter comes within the purview of the legislation. Section 1605 reads: "Every person shall be deemed practicing osteopathy within the meaning of this Act who shall (a) attend to, or use in connection with his or her name the words 'Doctor of Osteopathy, or Diplomat of Osteopathy, or Osteopath, or Osteopathist, or Osteopathic Practitioner, or Osteopathic Physician,' or words of like import, or any abbreviation thereof, or the letters 'D. O.,' or who shall (b) profess publicly to, or who shall, either on his own behalf, in his own name, or in his trade name, or in behalf of any other person, corporation, association, partnership, either as manager, bookkeeper, practitioner, or agent, treat, cure, alleviate or relieve any ailment or disease of either mind or body or cure or relieve any fracture or misplacement or abnormal condition or bodily injury or deformity, by any treatment, or manipulation or method of manipulating a human body or any of its limbs, muscles or parts, by the use of the hands, or mechanical appliances, in an effort or attempt to relieve any pressure, obstruction, misplacement or defect, in any bone, muscle, ligament, nerve, vessel, organ or part of the body, after having received, or with the intent or expectation of receiving therefor either directly or indirectly any bonus, gift or compensation whatsoever: Provided, however, that nothing in this section shall be construed to restrain or restrict any legally licensed physician or surgeon in the practice of his profession."

In Webster's New Standard Dictionary "chiropractic" is defined as: "A system of the practice of adjusting the joints, especially of the spine, by hand for the curing of disease." We gather from the brief of counsel that one who practices the system is technically designated as a "chiropractor."

The legislature in formulating the definition in section 1605, *supra*, manifested the intention to make the regulations applicable to the practice of osteopathy equally applicable to every branch of the healing art by the use of the hands, by whatever name the practitioner might call himself or apply to the system. Since this definition is broad enough to include the system of chiropractic, the inference is necessary that the legislature intended to include it, whether it was a matter of common knowledge or not.

The title of the Act of 1905 is the following: "An Act to regulate the practice of osteopathy in the state of Montana, and to license osteopaths to practice in the state, and to establish a board of osteopathic examiners, and to punish persons violating the provisions of this Act, and to repeal House Bill No. 38 of the 7th Legislative Assembly of the state of Montana, approved Feb. 26, 1901."

The following is the title of the amendatory Act: "An Act to amend sections 8 and 12 of chapter 51, Laws of 1905, relating to the practice of osteopathy contrary to law in the state of Montana, and providing a penalty therefor, and defining what evidence shall be deemed sufficient to constitute the practice of osteopathy."

The provision of the Constitution invoked by counsel has so frequently been considered and its scope and meaning declared by this court that it would be a work of supererogation to enter upon a discussion of it again. In brief, it may be stated that its purpose is to prevent fraud and deception in the enactment of legislation, and to this end to require that every bill introduced in the legislature must relate to a single subject which shall be so clearly expressed in a title prefixed to it that both the members of the legislature and the public may understand

the object to be accomplished by it. (*State v. Anaconda C. Min. Co.*, 23 Mont. 498, 59 Pac. 854; *State v. McKinney*, 29 Mont. 375, 1 Ann. Cas. 579, 74 Pac. 1095, and cases cited; *Yegen v. Board of County Commrs.*, 34 Mont. 79, 85 Pac. 740.)

The title of the Act of 1905 discloses that the subject of the proposed legislation was the regulation of the practice of osteopathy. The title of the amendatory Act also refers exclusively to the practice of osteopathy, and indicates that it was the intention of the legislature to define what that expression was intended to include. That this definition includes the practice of chiropractic and applies to chiropractors is no valid objection to it. It meets the requirement of the provision of the Constitution relied on and is valid.

2. We notice next the contention that these provisions are [2] invalid because they are arbitrary and unreasonable class legislation. It is said that the proviso in section 1605 permits a regularly licensed practitioner of medicine or surgery to practice osteopathy without a license from the state board of osteopathic examiners, whereas it prohibits everyone else from doing so without a license, and hence is repugnant to section 1 of the Fourteenth Amendment of the Constitution of the United States, which guarantees the equal protection of the laws. In the case of *State v. Dodd*, *supra*, the contention was made that the proviso found in section 1591 of the statute, relating to the practice of medicine, denies to every person, except an osteopath, the right to practice medicine or surgery without a license while it permits him to practice it. In disposing of the contention, the court, speaking through Mr. Justice Holloway, said: "Counsel for appellant insists that the effect of that section, with the proviso quoted, is to deny to every person, except osteopaths, the right to practice medicine or surgery in Montana without a certificate from the state board of medical examiners, and that, in excepting licensed osteopaths from the operation of its provisions those persons thus favored are free to engage in the practice of medicine or surgery without having to submit to the ordeal of an examination and without having the

certificate required of every other one who seeks to engage in the like practice. If the construction thus sought to be placed upon the language of section 1591 is justified, we might readily assent to the conclusion that the classification made is an arbitrary one, and that the case presented upon this appeal falls within the rule announced in *State v. Cudahy Packing Co.*, 33 Mont. 179, 114 Am. St. Rep. 804, 8 Ann. Cas. 717, 82 Pac. 833, and that the statute in its operation denies to the appellant the equal protection of the laws. In assuming, however, that section 1591 permits an osteopath to practice medicine without a certificate from the state board of medical examiners, counsel for appellant errs, and with the fall of this, his fundamental premise, goes his entire argument." It was further said: "When the proviso was inserted in what is now section 1591, the legislature understood that the practice of osteopathy (a) did not comprehend the practice of medicine or surgery; and (b) that it was already regulated and controlled by appropriate statutes enacted pursuant to the police power of the state. The only effect, then, of this legislation, has been to classify all those engaged in the healing art into two classes: (1) Physicians and surgeons, or those engaged in the practice of medicine or surgery; and (2) osteopaths, or those devoted to the practice of osteopathy. That legislation which makes a reasonable classification of subjects is not open to any constitutional objection upon that ground has been determined so often that argument upon the matter may well be deemed foreclosed." If section 1591 does not authorize an osteopath to practice medicine or surgery, obviously section 1605 does not permit a practitioner of medicine or surgery to practice osteopathy; and so it was held in the decision in *State v. Wood*, 53 Mont. 566, 165 Pac. 592.

3. It is contended that the statute makes an arbitrary classification denying the right of citizens to engage in a lawful [3] occupation, and is therefore an abuse of the police power of the state. This contention has heretofore been several times the subject of consideration by this court, and determined con-

trary to the contention of counsel. (*Craig v. Medical Examiners*, 12 Mont. 203, 29 Pac. 532; *State ex rel. Board of Medical Examiners v. District Court*, 26 Mont. 121, 66 Pac. 754; *Johnson v. City of Great Falls*, 38 Mont. 369, 16 Ann. Cas. 974, 99 Pac. 1059; *State v. Dodd*, *supra*.) In *State v. District Court*, *supra*, in considering the validity of the provisions relating to the practice of medicine or surgery, the court said: "It may be stated, as a general proposition, that every person has a natural right to pursue any lawful business or profession. This general statement is subject, however, to the limitation that the person asserting such a right must, before attempting to exercise it, comply with all reasonable police regulations made by the state touching the qualifications declared necessary for the particular calling. In the absence of such regulations, the right is absolute, and may be exercised at pleasure; but where they exist, compliance with them is a condition precedent, and until this condition is fulfilled the right is in abeyance, and may not be exercised at all. * * * Such legislation has always been upheld as a wise exercise of the police powers of the state, and necessary to the protection of the public. This is particularly true of a calling or profession which requires technical knowledge and skill. Without such knowledge and skill in the practitioner, there is danger that damage will result to those who employ him. Therefore one may be prohibited from pursuing such a calling or profession until he has been examined by the lawfully constituted authorities, and declared sufficiently qualified to engage in it with safety to the public."

Counsel for defendant insists that chiropractic is not the [4] same science or system as osteopathy, and that it is not reasonable to require a chiropractic who recognizes no similarity between the system he practices and osteopathy to pursue the course of study at a school of osteopathy as provided by the statute (sec. 1598) and to be examined upon the theory and practice of it. The mere difference in name, however, does not alter the fact that, whatever may be the distinction between the two as to the technical method of administering treatment,

both administer it by the use of the hands. The spine is one of the parts of the body. The confinement by the chiropractor of his treatment principally to the spine does not excuse him from undergoing the ordeal of the examination prescribed for osteopaths whose treatment includes the spine as well as all other parts of the structure of the human body. Because of the difference in name it cannot be said that the examination prescribed by the legislature has proper relation to the practice of osteopathy, while it has none to the practice of the chiropractic. In the judgment of the legislature, proficient knowledge of the anatomy and the other branches of science enumerated (sec. 1598) was deemed necessary to qualify an osteopath to treat the human body. Counsel does not question the propriety of this requirement so far as it applies to the practice of osteopathy. If proficient knowledge of these sciences pertaining to the human body have no relation to the practice of chiropractic, which is nothing more nor less than osteopathy under another name, it is impossible to conceive what qualifications a practitioner of it should possess.

In *Dent v. West Virginia*, 129 U. S. 114, 32 L. Ed. 623, 9 Sup. Ct. Rep. 231, approved by this court in *Craig v. Medical Examiners*, *supra*, the court, after declaring that it is within the province of the state legislature to regulate the practice of medicine in order to protect the members of the public from the consequences of ignorance and incapacity, as well as deception and fraud, laid down the test of the validity of the regulations on the subject as follows:

“The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession or are unattainable by such reasonable study and application that they can operate to deprive one of his right to pursue a lawful vocation.”

4. It is argued that the legislation is an attempt to restrict all healing by drugless treatment to a single school, and thus confer [5] a monopoly on the school of osteopathy. This contention is without merit. It is true that the statute defines the practice of osteopathy as a drugless treatment, because it is therein limited exclusively to treatment by use of the hands or mechanical appliances, and requires acquaintance with the various sciences enumerated and the theory and practice according to the standards prescribed by recognized schools of osteopathy. But this does not give this school a monopoly of the practice. It leaves every person who in the judgment of the board has demonstrated that he possesses the knowledge and qualifications prescribed to engage in the practice and to earn his livelihood by this means. The legislation is not rendered objectionable by the fact that some persons choose to adopt another name and profess to belong to and to represent a different school. The statute merely discloses that one using the method of treatment therein described shall be deemed practicing osteopathy, and that he must secure a license before he engages in the practice for compensation. If he does this, he has fully complied with the statute, and it is not material whether he chooses to style himself chiropractor or osteopath. In enacting the statute the legislature was concerned about the qualifications which the practitioner must possess to the end that the public should be protected from fraud and imposition, and not with the names of schools.

5. The information charges: That on or about the 23d day of October, 1915, the defendant "did willfully, unlawfully," *etc.* "practice osteopathy under and by the name of chiropractic or [6] chiropractor, * * * without first having obtained a certificate or license from the state board of osteopathic examiners of the state of Montana." The court instructed the jury in part as follows: "The material and necessary allegations of the information herein which must be established by the state beyond a reasonable doubt are the following: * * * (3) That the defendant did not first obtain a certificate or license from the state board of osteopathic examiners of the state of Montana."

It is asserted that there is no evidence showing that the defendant did not have a temporary certificate from the board permitting him to practice at the time alleged in the information. It is contended that the verdict is obviously contrary to the instruction, and hence contrary to the law.

The statute (Rev. Codes, sec. 1595) requires the secretary of the board to keep a record of the names of all applicants for license, the time each has devoted to the study and practice of osteopathy, and the name and location of the school from which he holds a diploma. It also requires him to keep a register of the names of all applicants licensed or refused a license. This record is declared to be *prima facie* evidence of all matters recorded therein. The license, when issued, must be signed by the president and secretary of the board. It is referred to in that section indifferently as a certificate or license. Section 1597 authorizes the secretary at any time when the board is not in session, upon examination of an applicant for license, to issue to him a temporary certificate permitting him to practice until the next meeting of the board; whereupon the applicant must submit himself to an examination by the board. If he then shows that he has the required qualifications, he is granted a certificate or license by the board. The argument of counsel assumes that the charge in the information refers to the temporary certificate issued by the secretary, whereas the charge is that the defendant engaged in the practice "without first having obtained a certificate or license from the state board," etc. This allegation was material, and the court properly instructed the jury that it must be established by the state beyond a reasonable doubt. Such in fact was the case; for the record of the secretary discloses that the defendant had never applied to the board for a license, nor even to the secretary for a temporary license or certificate, and there was no evidence to contradict it. The argument of counsel therefore falls to the ground.

In formulating the information the county attorney proceeded [7] upon the correct assumption that it was not necessary for him to allege that defendant had not procured a temporary cer-

tificate; as that forms no part of the charge of a violation of the statute, but is a matter of defense. (*State v. Wood, supra.*)

The information also alleges that the defendant was not a duly [8] licensed practitioner of medicine or surgery. The court informed the jury that they must find the truth of this allegation beyond a reasonable doubt before they could convict the defendant. It is argued that there was no evidence that the defendant was not duly licensed to practice medicine or surgery, and hence that the verdict in this particular is contrary to law. The original Medical Practice Act was passed in 1889. (Laws 1889, p. 175.) It prohibited the practice of medicine or surgery by anyone who did not hold a certificate from the board of medical examiners created by it. It provided, among other things, for the granting of a certificate by the board to any applicant upon presentation of a diploma from a medical school legally organized and of good standing. If the applicant was not a graduate as therein provided, he was required to apply to the board and submit to an examination as to his proficiency in knowledge of the branches of learning enumerated, unless he had been engaged in the practice in the territory for not less than ten years. In the latter case he was not required to submit to an examination, but was required to present to the board satisfactory evidence that he came within the exception. (Sec. 3.) Those who came within the exception, as well as other persons thereafter commencing to practice, were required to obtain a certificate or license. (Sec. 4.) Section 2 required the board to keep a record of its proceedings, including a register of the names of all applicants, both those who received certificates and those whose applications were rejected. This record was declared by that section to be *prima facie* evidence of all matters therein recorded. The original Act has been amended in several particulars. It is not necessary to refer to the amendatory Acts. It is sufficient for present purposes to say that, however the legislation has been changed otherwise, the provision relating to the keeping of the record and its value as evidence has been retained substantially as it was in the original Act. (Rev.

Codes, sec. 1586.) We shall not stop to inquire whether the allegation in the information is material, and hence whether the instruction submitted to the jury was proper. Assuming this to be so, the contention of counsel is without merit. Dr. W. C. Riddell, the present secretary of the board, who had in his possession in the courtroom the records of the board from the date of its first meeting up until the date of the trial, testified that the name of the defendant did not appear upon the register of applicants to the board for a certificate or license. The record being identified as one required by law to be kept by an officer of the board, the presumption attached that it had been correctly kept. (Rev. Codes, sec. 7962.) It was therefore *prima facie* evidence that the defendant was not licensed to practice medicine or surgery. This was sufficient to send the case to the jury.

Other questions are suggested by counsel in his brief; but they are not argued, and therefore are not noticed.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

BENNIGHOFF, APPELLANT, v. ROBBINS, EXECUTOR, RESPONDENT.

(No. 3,782.)

(Submitted June 6, 1917. Decided July 2, 1917.)

[166 Pac. 687.]

Statute of Frauds—Primary and Collateral Obligation—Payment by Volunteer—Evidence.

Statute of Frauds—Evidence—Sufficiency.

1. In an action against a decedent's estate to recover amounts advanced on account of a corporation, evidence *held* to justify a finding that decedent and plaintiff, while directors and stockholders of the company, before disbursement of any funds, orally agreed that they would finance the company and personally advance funds to meet its obligations, and that, if either failed to obtain reimbursement from

the company, there should be an accounting between them, each promising to pay a half of the sums advanced; *held* further, that the agreement was on its face one within the statute of frauds, because oral.

Same—Primary and Collateral Obligation.

2. Plaintiff's advances having been noted upon the company's books as its liability, and it formally executing to him a note, which, whether intended as a liquidation or not, operated as an acknowledgment and acceptance of what he had done in advancing funds, there was a primary obligation between plaintiff and the company, to which the agreement between plaintiff and decedent was collateral.

Same—Payment by Volunteer.

3. Under the circumstances noted above, and the further one that plaintiff was looked to to keep the company on its feet, payments made by him were those of a mere volunteer, for which it was not liable.

Same—Obligation Must be Legal, not Moral.

4. The consideration which, under section 5660, subdivision 3, will convert a promise to answer for the obligation of a third person into an original obligation of the promisor, so as to take it out of the statute of frauds, must be one tangible at law—a legal, pecuniary benefit, rather than a moral obligation.

Same—Taking Promise Out of Statute—Exclusive Credit to Promisor.

5. Where two directors of a corporation in need of financial aid orally agreed with each other that each would answer to the other for advances made by each to it, provided things could not be so arranged that both should be made whole by the corporation, neither became a principal debtor to the other and the agreement was not taken out of the statute of frauds (sec. 5660, subd. 2, Rev. Codes), since credit was not given to the promisor exclusively.

[As to what is a contract to answer for or pay the debt of another within the meaning of the statute of frauds, see note in 126 Am. St. Rep. 487.]

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

ACTION by George F. Bennighoff against E. L. Robbins, as executor of the estate of John D. Losekamp, deceased. From a judgment for defendant, and an order denying plaintiff's motion for new trial, plaintiff appeals. Affirmed.

Cause submitted on briefs of counsel.

Messrs. Collins, Campbell & Wood, for Appellant.

The agreement in suit is not affected by the statute of frauds for the following reasons:

1. The elements of an agreement to answer for the debt, default or miscarriage of another are lacking.

The rule is stated in Browne on Statute of Frauds, paragraph 188, as follows: "The statute applies to promises to pay the debt of another; and this is construed by the courts of both countries to mean the debt of some person other than the immediate parties to the contract of guaranty and owed to one of those parties." (See, also, *Tighe v. Morrison*, 116 N. Y. 263, 5 L. R. A. 617, 22 N. E. 164; *Kilbride v. Moss*, 113 Cal. 432, 54 Am. St. Rep. 361, 45 Pac. 812; *Resseter v. Waterman*, 151 Ill. 169, 37 N. E. 875; *Enos v. Anderson*, 40 Colo. 395, 15 L. R. A. (n. s.) 1087, 93 Pac. 475; 20 Cyc. 160, 162; *Donovan-McCormick Co. v. Sparr*, 34 Mont. 237, 85 Pac. 1029.)

2. The agreement, if collateral to the obligation of a third person, is governed by paragraph 3, section 5660, Revised Codes. Where the leading purpose of a person agreeing to pay the debt of another is to gain some advantage or to promote some purpose or interest of his own, and there is a consideration beneficial to the promisor, the contract is valid, though not in writing. (*Carothers v. Connolly*, 1 Mont. 433; *McCormick v. Johnson*, 31 Mont. 266, 78 Pac. 500; *Davis v. Patrick*, 141 U. S. 479, 35 L. Ed. 826, 12 Sup. Ct. Rep. 58; *Trulock v. Blair*, 8 Okl. 345, 58 Pac. 1097; *Peyson v. Conniff*, 32 Neb. 269, 49 N. W. 340; *Burr v. Cross*, 3 Cal. App. 414, 86 Pac. 824; *Grand Forks Lumber & Coal Co. v. Tourtelot*, 7 N. D. 587, 75 N. W. 901; *White v. Rintoul*, 108 N. Y. 222, 15 N. E. 318; *Choate v. Hoogstraet*, 105 Fed. 713, 46 C. C. A. 174; *Mine & Smelter Supply Co. v. Stockgrowers' Bank*, 173 Fed. 859, 98 C. C. A. 229; *Clay v. Walton*, 9 Cal. 328; Browne on Statute of Frauds, par. 214A.)

3. The agreement, if collateral to the obligation of a third person, is governed by paragraph 2, section 5660, Revised Codes. This court in *McGowan Commercial Co. v. Midland Coal & Lumber Co.*, 41 Mont. 211, 225, 108 Pac. 655, has approved the construction given an identical Code section in South Dakota by the supreme court of that state in *Meldrum v. Kenefick*, 15 S. D. 370, 89 N. W. 863. It is as clear from the record here as in the South Dakota case, *supra*, that "From the plaintiff's evidence he relied upon the agreement of the defendant (Losekamp) to

pay him.” Therefore, the agreement is an original undertaking and valid, though not in writing.

Messrs. Johnston & Coleman, for Respondent.

The cases cited by counsel in the first subdivision of their brief, viz.: *Tighe v. Morrison*, 116 N. Y. 263, 5 L. R. A. 617, 22 N. E. 164; *Kesseter v. Waterman*, 151 Ill. 169, 37 N. E. 875; *Kilbride v. Moss*, 113 Cal. 432, 54 Am. St. Rep. 361, 45 Pac. 812; *Enos v. Anderson*, 40 Colo. 395, 15 L. R. A. (n. s.) 1087, 93 Pac. 475, proceed upon the theory that, in order to bring a promise to answer for the “debt, default or miscarriage” of a third person within the statute, the third person must be under a legal liability to the person to whom the promise is made. By these decisions these courts give effect only to the words “debt,” and “default,” and not to the word “miscarriage.” The words “debt” and “default” do import an obligation enforceable at law; but such is not the common acceptation of the word “miscarriage.” (*Gansey v. Orr*, 173 Mo. 532, 73 S. W. 477; *Brown v. Adams*, 1 Stew. (Ala.) 51, 18 Am. Dec. 36; *Ferrell v. Maxwell*, 28 Ohio St. 383, 22 Am. Rep. 393; *May v. Williams*, 61 Miss. 125, 48 Am. Rep. 80; *Bissig v. Britton*, 59 Mo. 204, 21 Am. Rep. 379; *Nugent v. Wolfe*, 111 Pa. St. 471, 56 Am. Rep. 291, 4 Atl. 15; *Baker v. Morris*, 33 Kan. 580, 7 Pac. 267.) While there appears to be a clear conflict of authority in the decisions of the various courts on this point, we believe the reasoning of the Missouri court to be more convincing than that appearing in the decisions referred to by counsel, and we therefore contend that this court should adopt what we believe to be the more reasonable position.

Was Mr. Bennighoff acting as a mere volunteer when he paid the debts of the corporation? If he was, this case would be brought within the doctrine of *Donovon-McCormick Co. v. Sparr*, 34 Mont. 237, 85 Pac. 1029; there would be no obligation resting on the corporation to repay Mr. Bennighoff the amount of his advances, and, if this court should adopt the reasoning of the New York, Illinois and California courts, Mr. Losekamp

would be liable as on an original contract. Considering the nature of Mr. Bennighoff's connection with the railway company, we do not believe any argument necessary to establish the fact that the payments made by him to the creditors of the company were neither made without reasonable cause nor officiously. "As in the case of other trustees, if the directors of a corporation necessarily advance their own money to save the properties of the corporation, they will be entitled to indemnity therefor out of the funds of the company, and in preference to the right to dividends of the holders of the preferred stock." (10 Cyc. 813; Clark & Marshall on Corporations, sec. 762; Thompson on Corporations, sec. 2838; *In re Gouverneur Publishing Co.* (D. C.), 168 Fed. 113; *Martin v. Victor Mill & Min. Co.*, 19 Nev. 180, 8 Pac. 161; *Sutton v. Farmers' Union Warehouse Co.*, 11 Ga. App. 338, 75 S. E. 336; *Atlantic Suburban Gas & Fuel Co. v. Johnson*, 81 N. J. Eq. 514, 88 Atl. 163; *O'Rourke v. Grand Opera House Co.*, 47 Mont. 459, 133 Pac. 965; *Tatem v. Eglanol Mining Co.*, 42 Mont. 475, 113 Pac. 295.)

The mere fact that a promisor was a heavy stockholder in a corporation and interested vitally in the success of the corporation would not constitute a sufficient consideration to take his oral promise to answer for the debt of the corporation out of the statute. (*Goldie Klenert Dist. Co. v. Bothwell*, 67 Wash. 264, Ann. Cas. 1913D, 849, 121 Pac. 60; *Turner v. Lyles*, 68 S. C. 392, 48 S. E. 301; *Putnam Mach. Co. v. Cann*, 173 Pa. St. 392, 34 Atl. 67.) Every person who makes a promise to answer for the debt of another presumably has some reason, sentimental, moral or pecuniary; but in order to take the promise out of the statute, the consideration must be an immediate, pecuniary benefit.

MR. JUSTICE SANNER delivered the opinion of the court.

In this case the trial court found as follows:

"I. That John D. Losekamp, deceased, in his lifetime, and the plaintiff, while each of said persons were directors and stockholders of the hereinafter named corporation, and prior to the

disbursement of any funds thereunder, entered into an oral agreement between themselves that they would finance the Eastern Montana Electric Railway Company, personally advancing sufficient funds to meet and discharge its obligations, then existing or which thereafter might be incurred, and, in the event of either of said parties failing to obtain reimbursement from the company, there was to be an accounting had between the parties, each promising to pay one-half of the sums so advanced and unpaid.

“II. That said parties performed the terms of said agreement, in part by indorsing notes given in the name of the company, and in part by advancing to and for the use of the corporation from their individual funds.

“III. The plaintiff, being in funds, individually advanced the said company the sum of \$11,510.10. Of said sum plaintiff deposited \$5,482.43 to the bank credit of the company, and the remainder is represented by payment and discharge of obligations of the corporation, including personal expenses.

“IV. That under the terms of said agreement the said John D. Losekamp, in his lifetime, of his individual funds, advanced to and paid for the benefit of said company the sum of \$1,254.10.

“V. That the plaintiff and the said Losekamp, deceased, never had an accounting or settlement between them for the moneys so advanced, and plaintiff presented his claim for the full amount advanced by him, with accrued interest, as set forth in the complaint, to the defendant, as executor of the last will of said John D. Losekamp, deceased. Defendant indorsed his allowance thereon in the sum of \$1,769.60, with interest, being one-half of the principal and interest of two notes indorsed by plaintiff and said John D. Losekamp, deceased, for the use and benefit of said company, and subsequently paid by the plaintiff.

“VI. That the said Eastern Montana Electric Railway Company executed and delivered its promissory note in writing to the plaintiff at his request for all advances made by him.”

Upon these findings the court concluded as a matter of law: “That the moneys advanced and expended by plaintiff were primarily expended on the credit of the corporation, and said John

D. Losekamp, deceased, was to become liable only in the event of the inability of the company to repay. That the agreement between plaintiff and said John D. Losekamp, deceased, is void by reason of the statute of frauds. That plaintiff is entitled to a judgment against defendant in the sum of \$1,769.60, with accruing interest, as provided in said notes, from their dates respectively. That each party shall pay his own costs." Judgment was entered accordingly, and from it, as well as from an order denying his motion for a new trial, plaintiff appealed.

Reversal is sought upon the grounds that the findings, conclusions and judgment are, and each is, unwarranted by the evidence. The argument is that the evidence shows the agreement in suit to have been one not affected by the statute of frauds, because (1) the elements of an agreement to answer for the debt, default or miscarriage of another are lacking; (2) the agreement, if collateral to the obligations of a third person, is covered by subdivision 3, section 5660, Revised Codes; (3) the agreement, if collateral to the obligations of a third person, is covered by subdivision 2, section 5660, Revised Codes.

I. The plaintiff testified: "The company was organized in 1909; in 1910 I went to Europe. When I came back from [1] Europe on October 4th it seems as though everybody was running after me for money. * * * Four or five days after this I went up to Mr. Losekamp's store. He says: 'George, we are in a pretty nice fix.' I says: 'How is this?' He says: 'All hollering money, and there has nothing been paid since you are gone. They all say, when you come back, we will straighten it out.' He says: 'I will tell you, as far as you and I are concerned, we cannot have our good name stained by reason of a few paltry thousand dollars.' He says: 'It looks as though we have to stand this.' I says: 'Not me; I didn't start this ball rolling.' So John says: 'You think it over.' We had another talk next day. He says: 'I will tell you, we cannot stand this, we are too old,' he says, 'and what is money? Money is nothing but to be used. We have to see this thing through.' He says: 'I go half and half.' I says: 'Yes?' I says then; 'Come

across.' * * * He said: 'I haven't got it.' I said: 'I haven't either. He said: 'Borrow it.' I said: 'Not me.' He says: 'That is the only way we can do.' So finally I said: 'Well, all right; I will pay them payments off, which is in the neighborhood of \$2,700 or \$2,800.' I advanced the money. In order to avoid paying percentage to the bank, I advanced it out of my own funds. So that advancing kept on whenever there was money needed; there was no questions asked; I was to pay. Being treasurer, I advanced the money as stipulated in the claim here, which Mr. Losekamp actually brought me into the game. That is the proposition; he bears half and I bear half, provided the thing goes by the wayside. When I say we were each to pay half, I have reference to the money I advanced. * * * I don't know whether Mr. Losekamp and I were stockholders and directors from the time the company was formed. I know I was one of the originators. I was one of the original stockholders and directors. I am still a stockholder. * * * I had this conversation with Mr. Losekamp between the 10th and 15th of October. * * * When I had my first conversation with Mr. Losekamp with reference to paying the bills that had already been incurred by the company, he didn't exactly say that he felt it to be a disgrace to me and to him to be connected with a company that hadn't paid its bills. He was talking to me about the outstanding bills. There was so much against the company, and he says: 'I helped the thing along, and I held it above water, so it wouldn't drown.' 'Now,' he says: 'George, there is no use talking,' he says, 'we are getting too old in this world to have anything hanging over us of dishonesty, or of not paying any bills which we are connected with.' I told him I agreed with his views. I told him there was others. He says: 'What do you think of it?' I told him I would consider it. The next day or two afterward I come up there. He told me: 'Well, not here; them people are running in the store wanting their money, the engineering corps and anything pertaining with it.' He says: 'I am about wore out.' 'Now,' he says, 'I will tell you; let's borrow some money and fix the thing up, and pay the ex-

penses; and you bear half and I bear the other half.' And I told him, I says: 'Wasn't in a borrowing mind.' He says: 'I ain't got a cent; I haven't got a cent, and you know I haven't. That oil deal takes all the money I have got.' He says: 'Borrow it.' I says: 'No; I am not in a borrowing mood.' He said: 'If you got it, advance it, and let's get through with this thing and finish it; I pay half and you pay half; is that satisfactory?' I didn't yield right away, but I thought the best way was to pay it out and be done with it, and not have everybody hollering after me: 'You owe me this much that you were entitled to pay.' So that is the way it came about. Q. When was it, Mr. Bennighoff, he said to you, 'I will pay my half provided the thing goes by the wayside?' A. That was in the first talk—in the first talk, the first conversation, he says: 'What will it amount to anyway; it won't amount to more than \$6,000, \$7,000, or \$8,000.' He says: 'You can stand it.' I says: 'You may, but I don't. You can stand it; that is the biggest we could get in you know.'

* * * I thought to myself, as long as he was a gamester, I didn't want to stand behind any way, and I told him I would submit to the proposition. I told him: 'All right, we will stay.' That wasn't the time he said he would pay his half, provided it would go by the wayside. He didn't say he would pay his half provided it go by the wayside. He said: 'Provided this thing goes off, and never comes through, I pay my half which you advance. I pay it; I ought to pay you now.' He said that the first, second, third, and fourth conversations." We think this justifies the first finding above quoted, and authorizes the view that the plaintiff and Mr. Losekamp agreed each to answer to the other for any funds paid out on account of the railway company, if that company should itself fail to properly respond—on its face an agreement which, because oral, is within the statute of frauds. It does not suffice to insist, with counsel, that another and different interpretation, based upon the plaintiff's obvious limitations in the use of English, was possible; the trial judge, who heard the testimony, was in better position to understand it than we are.

The point is made, however, that there is no evidence of any [2] direction or request by the Eastern Montana Electric Railway Company for the payment of the obligations taken up by the plaintiff; that such payment was, so far as the company is concerned, the act of a mere volunteer, for which the company is not liable; that, this being so, there was no primary obligation as between the plaintiff and the company to which the agreement of the plaintiff and Mr. Losekamp could be collateral, and therefore the latter agreement was an original one, and not within the statute of frauds. This reasoning, if valid, could have no application to the moneys deposited in bank to the credit of the company and used by it, nor to the moneys paid out upon the notes of the company, indorsed by the plaintiff and Losekamp; the field of its operation would be confined to the comparatively small amount representing the difference between what the plaintiff paid upon obligations of the company, other than notes, and the sum similarly paid by Mr. Losekamp. The reasoning, however, is not valid. The plaintiff was a stockholder and officer of the company; he was keenly and justly interested in its success; his advances were noted upon the books as company liabilities; he was looked to in large measure to keep it on its feet; and it formally executed to him a note which, whether intended as a liquidation or not, operated as an acknowledgment and acceptance of what he had done. In these circumstances, the advances made cannot be said to stand without any promise, express or implied, to repay. (*O'Rourke v. Grand Opera House Co.*, 47 Mont. 459, 133 Pac. 965; *In re Gouverneur Pub. Co.* (D. C.), 168 Fed. 113.) Nor can they be held acts of an offi- [3] cious volunteer, within the rule recognized by this court in *Smith v. Perham*, 33 Mont. 309, 83 Pac. 492, *Donovan-McCormick Co. v. Sparr*, 34 Mont. 237, 85 Pac. 1029, and *Penwell v. Flickinger*, 46 Mont. 526, 129 Pac. 323.

II. The contention that the agreement between plaintiff and Losekamp is covered by subdivision 3 of section 5660, Revised Codes, is based upon the proposition that it was made at the instance of Losekamp to subserve an interest or purpose of his

own, to-wit, the conservation of his credit. *Carothers v. Connolly*, 1 Mont. 433, *McCormick v. Johnson*, 31 Mont. 266, 78 Pac. 500, and authorities from other jurisdictions are cited; but the contention cannot be upheld for these reasons: The record does not command the inference that conservation of Losekamp's credit was the principal and primary object in mind, but rather that the object in mind was to see that the obligations of the company were met, and thus incidentally relieve the parties from the imputation of having been connected with a concern which could not or would not pay its honest debts. The motive was [4] to satisfy a highly commendable sentiment; but the consideration which, under subdivision 3 of section 5660, will convert a promise to answer for the obligation of a third person into an original obligation of the promisor, so as to take it out of the statute of frauds, must be one tangible at law, a legal, pecuniary benefit, rather than a moral or sentimental purpose. All the cases cited by plaintiff, so far as they are pertinent, illustrate this, and the authorities generally are in accord upon the subject. (20 Cyc. 191; *White v. Rintoul*, 108 N. Y. 222, 15 N. E. 318; *Fletcher v. Puckett* (Tex. Civ. App.), 170 S. W. 831; *Clapp v. Webb*, 52 Wis. 638, 9 N. W. 796; *Goldie-Klenert Dist. Co. v. Bothwell*, 67 Wash. 264, Ann. Cas. 1913D, 849, 121 Pac. 60.)

III. By subdivision 2 of section 5660 it is made the rule that: [5] "A promise to answer for the obligation of another * * * is deemed an original obligation of the promisor, * * * where the creditor parts with value, or enters into an obligation, in consideration of the obligation in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the principal debtor, and the person in whose behalf it is made, his surety." It is contended that under this provision the promise of Losekamp was an original obligation, because the plaintiff looked to Losekamp for payment, or, as was said in *McGowan Com. Co. v. Midland C. etc. Co.*, 41 Mont. 211, 225, 108 Pac. 655, Losekamp was the one to whom "credit was given." We took occasion in the later case of *Fortman v. Leggerini*, 51 Mont. 238, 152 Pac. 33, to point

out, however, that: "It is requisite that credit should be given exclusively to the promisor; if any credit be given to him for whose benefit the promise is made, the promisor is not liable unless his promise is in writing, and this is so, although the collateral undertaking may have been the principal inducement." Let it be conceded, therefore, that Losekamp's promise was the principal inducement for the advances made by the plaintiff; it is nevertheless clear that credit was not given to him exclusively, for the plaintiff himself says the proposition was, "He bears half and I bear half, provided the thing goes by the way-side"; or, "He [Losekamp] says, 'Provided this thing goes off, and never comes through, I pay my half which you advance.' " This means: If matters could not be so arranged that both the plaintiff and Losekamp should be made whole by the company, then they were to answer to each other. How such an agreement would make either of them the principal debtor to the other, with the company standing as surety, is not apparent to us.

On the whole case we are convinced that, while a different interpretation of the testimony might have been possible and thus have commanded a different result, the record does not present a situation with which we ought to interfere. The judgment and order appealed from are therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

BUTTE MINER CO. ET AL., RESPONDENTS, v. M. J. CONNELL CO., APPELLANT.

(No. 3,762.)

(Submitted June 11, 1917. Decided July 2, 1917.)

[166 Pac. 296.]

Receivers—Excessive Compensation—Modification of Award.

1. The secretary-treasurer of a mercantile corporation was appointed receiver thereof. His compensation as secretary-treasurer had been \$4,000 per annum. His bond as receiver was paid by the trust. The net profits of the concern for the period during which he acted as receiver (ten months and eighteen days) were about \$48,000, subject to deductions for his compensation and attorneys' fees. The receivership proceedings were of a friendly nature. His duties as receiver were much the same as they had been as employee of the company, and his responsibility to the court was no greater than it had been to it. He was allowed the sum of \$20,180 as compensation for his services as receiver for the time mentioned above. *Held*, excessive, and that an allowance of \$8,000 was ample under the circumstances.

Appeal from District Court, Silver Bow County; J. B. McClernan, Judge.

SUIT by the Butte Miner Company, a corporation, against the M. J. Connell Company, a corporation, and W. J. Ruffner, its receiver. From an order allowing the receiver compensation, the M. J. Connell Company appeals. Order modified.

Messrs. J. L. Wines, T. J. Harrington, John E. Corette and William T. Pigott, for Appellant, submitted a brief and one in reply to that of Respondent; *Mr. Pigott* argued the cause orally.

The order of May 10, 1915, declared "that the compensation of the receiver be and the same is hereby fixed and allowed at \$17,000 in addition to what he had already received." That order contained no provision as to whether the plaintiffs or defendant should be charged with the allowance, nor any provision as to the fund out of which it was payable. It was therefore not appealable. (*State ex rel. Heinze v. District Court*, 28 Mont. 227, 72 Pac. 613; *Rochat v. Gee*, 91 Cal. 355, 27 Pac. 670; *Grant v. Superior Court*, 106 Cal. 324, 39 Pac. 604; *Grant v.*

Los Angeles & P. Ry. Co., 116 Cal. 71, 47 Pac. 872; *Ogden City v. Bear Lake etc. Irr. Co.*, 18 Utah, 279, 55 Pac. 385; High on Receivers, 4th ed., p. 936, sec. 796a.)

The court erred to the prejudice of appellant in allowing the respondent \$20,000 as compensation, or any sum in excess of \$8,000; and appellant insists that this court should either reverse the judgment of allowance or modify it by scaling the amount down to a reasonable sum, with costs to appellant. (See *Hickey v. Parrot S. & C. Co.*, 32 Mont. 143, 154, 108 Am. St. Rep. 510, 79 Pac. 698; *French v. Gifford*, 31 Iowa, 428; *Williams v. Morgan*, 111 U. S. 684, 28 L. Ed. 559, 4 Sup. Ct. Rep. 638; *McArthur v. Montclair Ry. Co.*, 27 N. J. Eq. 77; *Central Trust Co. v. Wabash etc. Ry. Co.*, 32 Fed. 187; 34 Cyc. 473.)

Mr. J. E. Healy, for Respondents, submitted a brief, and argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

On July 1, 1914, the M. J. Connell Company, a merchandising corporation doing business in Butte, had a capital stock, all outstanding, of \$250,000. Its gross assets, book value, were \$402,685.86. Its acknowledged liabilities were \$304,302.30; but its president, W. T. Knott, had, without any authority from it, issued in its name promissory notes to a very large amount, not one dollar of which had gone through its books or come into its possession or been expended for its use. It was affiliated with the H. B. Claffin Company of New York, by whom or whose stockholders the majority of its stock was held, and the H. B. Claffin Company had failed. Publication had been generally made that the M. J. Connell Company was involved in that failure. There was danger that efforts would be made to surcharge it with the promissory notes so unauthorizedly issued in its name, and its assets were in peril of dissipation. Its local head was Daniel Coleman, its vice-president and general manager; and in this situation he, together with the Butte Miner Company, one of its creditors, filed a complaint praying for the

appointment of a receiver to conduct its business, conserve its assets, and distribute the proceeds thereof to those entitled to the same. The M. J. Connell Company, by W. J. Ruffner, its secretary, filed answer admitting all the allegations of the complaint, joined in the prayer thereof, and submitted its rights in the premises to the protection of the court. Thereupon the plaintiffs and the defendant joined in an application that Mr. Ruffner be named as receiver, which was done. He took the oath and qualified by filing a surety company bond as required by the order of the court in the sum of \$30,000.

At the time he was appointed Mr. Ruffner was secretary and [1] treasurer of the M. J. Connell Company. He had been such for two years. His duties, as described by himself, were these: "I had charge of the finances and of the offices; my duties were largely with expense, and looking after the funds, insurance and statistics; I kept the general books, the property books, and helped on everything; I acted practically as superintendent in handling help and expense; in fact, there was nothing I didn't do." For these services, which occupied all of his time and called forth his best efforts, he had been compensated at the rate of \$4,000 per annum. According to his own report as receiver filed March 31, 1915, the gross assets of the trust then amounted to \$496,096.02, with liabilities of \$347,591.45, leaving a balance of \$148,504.57; and he testified that the net profits for the period concerned had been about \$48,000, subject to deductions for his compensation and for attorney's fees. Upon his application at the inception of the receivership, the court had entered an order allowing him to withdraw, as partial compensation, \$300 per month, which he did, receiving in all \$3,180. He asked for \$30,000, and was allowed \$17,000 additional to what he had received, or \$20,180, as his compensation for 10 months and 18 days' services as receiver. The propriety of that order, in so far as it authorized a gross allowance in excess of \$8,000, is the subject of this appeal.

We think that \$8,000 is more than ample. It represents for about 270 working days of eight or nine hours each exactly twice the annual salary Mr. Ruffner had theretofore accepted; yet the service rendered by him as receiver was not twice as great nor twice as difficult as that which he had rendered as secretary and treasurer. Indeed, his hours and his duties were very much the same, while he was held to neither greater nor less loyalty, neither greater nor less diligence, neither greater nor less skill, than had been due from him to the company. (*Hickey v. Parrot S. & C. Co.*, 32 Mont. 143, 155, 108 Am. St. Rep. 510, 79 Pac. 698.) It is true that as receiver he was bonded, was responsible to the court instead of to the directors and stockholders of the company, his correspondence was augmented and somewhat different in character, and he was called upon to consult counsel from time to time; but his bond was paid for by the trust, his responsibility to the court was not greater than it had been to the company, he had the same efficient assistance in the conduct of details as before the receivership, and by his side stood Coleman, a very competent man, performing for \$500 per month the same functions that he had performed as Ruffner's superior. In point of fact, the burden and heat of the day fell upon these two, Ruffner and Coleman, after the receivership as it had done before, save that their responsibilities were theoretically reversed.

The record shows that for a receivership the respondent's tenure was singularly uneventful and placid. The complaint, the answer, the order appointing the receiver, his qualification, all occurred on the same day—circumstances which tend to support the claim that the proceedings were friendly, involved no contest, promised no overwhelming burden, demanded no masterful ability. There was no litigation. The vast mass of unauthorized commercial paper which threatened to engulf the concern was handled in New York without serious trouble to the receiver and without detriment to his trust. He was never called upon for anything more than an ordinary kind of clerical or technical service in connection with these matters. His principal service was to conduct the business in Butte, and this he

did, with the assistance he had, in a manner worthy of all praise. He has been a good steward, and should be paid accordingly; this does not mean, however, that trust estates in this jurisdiction are to be regarded as common prey. "It is well established," we said in the *Hickey Case*, above cited, "that the compensation allowed a receiver must be reasonable; but why compensation must be greater, in order to be reasonable, for doing certain work, when the hiring is done by the court than it would be for the same duties if the hiring were done by an individual is not apparent. Where extra duties are enjoined, as giving a bond or otherwise, that are not compensated for in some other manner, additional pay may be allowed; otherwise there is no reason why it should not be the same."

Counsel for respondent vigorously insists that the circumstances leading up to this receivership present a monumental instance of commercial piracy which the courts ought not to make it too easy to repeat, and therefore the allowance below should stand as a discouragement to such proceedings. We agree with the premise, but not with the conclusion. The control of commercial piracy is a matter for general law, and the rights of others besides those responsible for the Clafin failure are involved in this receivership; and to permit this allowance to stand would, in our judgment, be a precedent of evil example.

Some procedural questions are raised, but we do not deem them of sufficient importance for special notice.

The order appealed from is modified so as to allow the receiver, respondent here, the sum of \$4,820 in addition to the \$3,180 he has heretofore had, making in all \$8,000 as his compensation, and the cause is remanded to the district court to proceed accordingly; appellant to recover its costs on this appeal.

Order modified.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

ANDERSON, RESPONDENT, v. MISSOULA STREET RY. CO.,
APPELLANT.

(No. 3,791.)

(Submitted July 2, 1917. Decided July 6, 1917.)

[167 Pac. 841.]

*Personal Injuries—Street Railways—Horse-drawn Vehicles—
Rights on Streets and Bridges—Last Clear Chance—Com-
plaint—Instructions—Evidence—Sufficiency.*

Personal Injuries—Doctrine of Last Clear Chance—Prerequisites.

1. To make the doctrine of the last clear chance applicable to a personal injury case, three things must concur: The exposed condition of the person injured brought about by his negligence; the actual discovery by defendant of his perilous situation in time to avert the injury; and the failure of defendant thereafter to use ordinary care to avert it.

Same—Street Railways—Horse-drawn Vehicles—Complaint—Sufficiency.

2. In an action against a street railway company for injuries to plaintiff caused by being thrown from a buggy, the horse attached to which had become unmanageable while being driven over a bridge, the gist of the complaint was that the motorman by his unnecessarily fast and noisy driving of a street-car frightened the animal and placed the occupants of the buggy in manifest danger, which danger, though increased as the car approached, the motorman disregarded. *Held*, that the pleading was sufficient as against the objection that there was no allegation of the peril of plaintiff.

Same—Fright of Animal—Duty of Motorman.

3. Instruction that if, as the street-car approached, the horse driven by plaintiff showed signs of becoming unmanageable, which condition was or should have been observed by the motorman, then it became his duty to slacken the speed of his car or to stop it, if necessary, in order to give plaintiff a better opportunity to control the horse, *held* proper under the pleadings and evidence.

Same—Allegations of Negligence—Proof of Any One Sufficient.

4. While plaintiff in a personal injury action cannot recover for negligence in any respect other than as stated in the pleadings, he is not required, where he relies on several particulars of negligence, to prove them all—proof of actionable negligence in any of the respects alleged being sufficient; hence an instruction that in order to recover, it was not necessary for plaintiff to prove that the street-car was going at a speed of twelve miles or more at the time of the accident (one of the three acts of negligence alleged), was not prejudicially erroneous.

Same—Duty of Motorman—Instructions—Proper Refusal.

5. An offered instruction that a street-car need not be stopped even at the discovery of the fright of a horse on the street, when that fright is occasioned by the usual and ordinary noises of the car, was properly refused, since street-cars (or automobiles) must be so operated as to prevent doing avoidable injury to others—stopping if and when necessary to that end.

Same—Evidence—Sufficiency—Review.

6. If there is sufficient evidence, if credited, to sustain plaintiff's case, the supreme court will not disturb the verdict of the jury, even though the evidence, when judged from the printed record, seems to preponderate against their finding.

Appeal from District Court, Missoula County; John E. Patterson, Judge.

ACTION by Clara B. Anderson, by John G. Anderson, guardian *ad litem*, against the Missoula Street Railway Company. From a judgment for plaintiff and an order overruling its motion for a new trial, defendant appeals. Affirmed.

Cause submitted on briefs of Counsel.

Mr. William L. Murphy and Mr. Walter M. Bickford, for Appellant.

In *Barnes v. North Carolina Public Service Corp.*, 163 N. C. 363, 48 L. R. A. (n. s.) 823, 79 S. E. 881, the court said: "It appears from the plaintiff's own evidence that he was not injured by reason of any negligence on the part of the motorman, but by reason of his horses becoming frightened by a street-car operated in the usual method. It is true that he had as much right on the street as the car, but the car had as much right as he did. It was serving the public in the usual and ordinary manner and without unnecessary noise." The same may be said concerning the refusal of the court to give defendant's offered instructions 'D-5' and 'D-9.' These refused instructions are supported by the following authorities: *Singer v. Missoula St. Ry. Co.*, 47 Mont. 218, 226, 31 Pac. 630; *Marion City R. Co. v. Dubois*, 23 Ind. App. 342, 55 N. E. 266; *Molyneux v. Southwest Missouri Elec. Ry. Co.*, 81 Mo. App. 25. The last case is authority for the broad principle that a motorman is not under an absolute duty to stop his car even when notified to do so by the driver of a nervous horse, where no imminent peril is indicated, unless his conduct or the management of his car shows a wanton disregard of the safety of the driver. (*Terre Haute Electric Ry. Co. v. Yant*, 21 Ind. App. 486, 69 Am. St.

Rep. 376, 51 N. E. 732; *Flaherty v. Harrison*, 98 Wis. 559, 74 N. W. 360.) The last two cases stand for the principle that it is not the duty of a motorman to at once stop or slacken the speed of his car at the sight of a frightened horse where the horse is held by his owner in a manner from which it might fairly be supposed he would be able to control him. (*M. V. S. E. R. Co. v. Houston*, 29 Ohio, C. C. 358; *Wachtel v. East St. Louis & St. L. E. Ry. Co.*, 77 Ill. App. 465; *Davison v. Wilkes-Barre etc. Traction Co.*, 10 Pa. Super. Ct. 442; *Danville Ry. etc. Co. v. Hodnett*, 101 Va. 361, 43 S. E. 606.) The last three cases are all in harmony with defendant's offered instruction D-9.

Messrs. Mulroney & Mulroney and Mr. G. J. Heyfron, for Respondent.

MR. JUSTICE SANNER delivered the opinion of the court.

The two portions of the city of Missoula which lie on either side of the Hellgate River are connected by a bridge 1,023.6 feet long. The width of the bridge is divided into a main roadway 28.9 feet wide and two footways—one on each side of the roadway—and the footways are separated from the roadway by railings. Along the center of the roadway is the street-car track of the Missoula Street Railway Company, and the clearance for vehicles on each side of the track, when a car is passing, is 10.6 feet. The bridge is not level, but ascends on a one per cent grade from the south end for a distance of about 174 feet, whence it descends to the north end. Its highest point is about 1.74 feet higher than the south end, and 9.28 feet higher than the north end. On the 21st day of February, 1914, the plaintiff with four companions was riding in a buggy pulled by a gentle, well-broken horse, crossing the bridge from south to north; the driver, as was proper, kept to the roadway on the east side of the railway track, so that street-cars occupying the track would pass to her left. The surface of the bridge was uneven, due to ice, slush and swollen blocks. "At the time," so the complaint alleges, "the buggy in which plaintiff was rid-

ing north on said bridge arrived at a point about 220 feet north of the south end of said bridge, one of defendant's street-cars, coming east along said railway track on South Third Street at a fast and excessive rate of speed, proceeded without stopping from said Third Street on to the south end of said bridge and at a high, fast and excessive rate of speed continued to go north on said bridge and when said car reached the highest point on said bridge, * * * plaintiff was in a buggy about ninety feet north of said car; that at said time the horse that plaintiff was driving became frightened at the approach of said car and began to act in a frightened and nervous manner and to shy sideways; that the motorman operating and in charge of said car saw the frightened and nervous manner in which plaintiff's horse was acting or by the use of the due and ordinary care and caution should have seen same, but regardless thereof said motorman negligently and carelessly rang the bell on his car and kept ringing same, although the rapid approach of said car and the great and rumbling noise it was making and said ringing of the bell on said car frightened plaintiff's horse, and said motorman could and did see that said horse was becoming more frightened as said car approached and said motorman, instead of slackening the speed of said car or stopping it as he should have done, did not slacken the speed of said car or stop it, but negligently and carelessly continued to go at a high, dangerous and excessive rate of speed and at a rate of speed so fast as to violate the ordinances and laws of the city of Missoula, and to ring the bell on said car faster and more loudly as he approached plaintiff until the front end of the defendant's car reached a point even with the rear end of the plaintiff's buggy, at which time the horse which plaintiff was driving having become more frightened as said car approached, became unmanageable and uncontrollable and jumped to the right to avoid said car, and the right front wheel of said buggy struck the railing on the east side of said bridge, breaking said wheel off at the hub; that the horse thereupon continued to be frightened and ran away in a northerly direction across said bridge,

that when said horse reached a point about halfway across said bridge the left front wheel of said buggy was torn off and plaintiff was thrown violently out of said buggy," sustaining the injuries for which recovery is sought in this case. The answer amounts simply to a denial of the allegations of the complaint, with an affirmative plea that the car was operated in the usual and proper manner and that it did not come in contact with the buggy or horse. The case was tried to a jury who, after hearing the evidence and the instructions, returned a verdict for the plaintiff upon which judgment was regularly entered. From that judgment as well as from an order overruling its motion for a new trial, the defendant railway company appeals. Reversal is sought upon four grounds, which will be noted *seriatim*.

I. It is said that certain instructions which incorporated the doctrine of the last clear chance injected a principle of law foreign to the issues and prejudicial to the defendant. The instructions thus assailed are numbered P. 1, P. 5, P. 7 and P. 8; and if they announce and authorize the jury to apply the doctrine of the last clear chance, they are error, for that doctrine was not in the case. To make that doctrine applicable [1] to any case, three things are indispensable, *viz.*: The exposed condition brought about by the negligence of the plaintiff or the person injured; the actual discovery by defendant of the perilous situation of the person or property in time to avert the injury; and the failure of the defendant thereafter to use ordinary care to avert the injury; all these elements must concur or the rule has no application. (*Dahmer v. Northern Pac. Ry. Co.*, 48 Mont. 152, 136 Pac. 1059, 142 Pac. 209.) No suggestion occurs in the complaint that the plaintiff's exposed condition was brought about by any negligence of hers or imputable to her.

But none of the instructions referred to announce, or attempt to announce, the doctrine of the last clear chance; they announce, or attempt to announce, the law of primary negligence, the defendant's duty of ordinary care as applicable to

the particular circumstances; and this they did with substantial accuracy so far as any objection appearing in the record discloses.

Instruction P. 1 sets forth the events claimed by the plaintiff as constituting her obvious peril—the basis of her assertion that the defendant's motorman was negligent—and tells the jury that if they find these to be facts, their verdict should be for the plaintiff. The objection to the instruction is "that, while [2] it is a correct statement of the law, under a proper cause, it does not conform to the theory of the case, as disclosed by the complaint or by the evidence, in that there is no allegation or proof of the peril of the plaintiff." The most cursory examination of the complaint, as of the testimony on the part of the plaintiff, would furnish ample refutation of this objection. The point of the plaintiff's whole position, which counsel seems to have lost, is that the motorman by his unnecessarily fast and noisy driving frightened the horse and placed the occupants of the buggy in manifest danger, which danger increased as the car approached, but which danger the motorman disregarded.

P. 5 states an abstract proposition of law, in effect this: That if the motorman, acting as an ordinarily prudent person, would have believed the plaintiff in peril and that he could not pass the buggy with reasonable safety to its occupants, then in passing he did not act with the proper degree of care. The objection to the instruction that "it does not conform either to the allegations of the complaint or the proof ordered with regard to the peril," is manifestly inapt.

P. 7 told the jury that if, as the car approached, the horse [3] showed signs of becoming unmanageable, which condition was or should have been observed by the motorman, then it became his duty to slacken the speed of his car or to stop it, if necessary, in order to give the driver of the horse a better opportunity to manage and control the horse. The objection is "that there was no loss of control of the horse on the part of the driver alleged in the complaint or proven in the evidence; and, second, that there is no suggestion either in the complaint or in

the evidence of the imminence of peril or loss of control." The instruction does not postulate actual, total loss of control; it postulates threatened loss of control, which the evidence shows did become actual and which is clearly suggested in the complaint. It is to be remembered that the affair occurred on a bridge where there was no chance for the driver to turn aside further than she did, and where her room for managing the horse was confined to the narrow space between the track and the rail.

P. 8 is to the effect that if, under the conditions stated, the motorman should have slowed down or stopped his car, it is immaterial as a matter of law whether the injury occurred as the front of the car reached the buggy, or as the rear end passed the horse. The objection "that it covers a state of facts not charged as negligence in the complaint; and, second, because the instruction is not in conformity with the theory of the remaining instructions offered by the plaintiff, nor in conformity with the theory of the last clear chance relied upon in the complaint," is, we must confess, not very plain to us. So far as we understand it, we say the complaint does not proceed upon the theory of the last clear chance; but does, as noted above, present as a fact that the plaintiff was imperiled by reason of the horse becoming restive and unmanageable through fear of the car, noisily approaching from behind.

Much valuable argument is addressed to the proposition that these instructions are wrong in principle—plain misdirections as to the law; but however this may be, it should be clear that they are not open to the objections urged against them and do not inject into the case any principle of law foreign to the issues.

II. The next contention is that the following instruction (P. 18) was incorrect and prejudicial: "You are instructed that [4] it is not essential, in order to entitle the plaintiff to recover, for the plaintiff to prove that the speed of the car was twelve miles an hour or more at the time of or prior to the injury." The objection was "that there is no proof on the part of the

plaintiff of any speed except that in excess of twelve miles an hour, and therefore the instruction is misleading and unnecessary; further, that it is not a correct statement of the law in this case, for the reason that the allegation of speed, there being only one speed alleged in the complaint, is in excess of twelve miles an hour, and the complaint, being definite in that regard, the plaintiff is required to prove at least that speed." The theory of this objection is wholly untenable. The complaint charges several particulars wherein the defendant's motorman in operating the car was negligent in view of plaintiff's situation, viz.: driving it with unnecessary clamor, driving it at an unreasonable rate of speed, driving it at a rate of speed so fast as to violate the ordinances of the city of Missoula. We have repeatedly held it to be unnecessary for the plaintiff in actions of this sort to prove every particular in which negligence is alleged, but that it is sufficient if actionable negligence be shown in any of the respects alleged. (*Michalsky v. Centennial Brewing Co.*, 48 Mont. 1, 134 Pac. 307; *Forquer v. Slater Brick Co.*, 37 Mont. 426, 97 Pac. 843; *Riley v. Northern Pac. Ry. Co.*, 36 Mont. 545, 93 Pac. 948.) The rule invoked by counsel that a plaintiff cannot recover for negligence in any respect other than as stated in the pleadings is obviously sound, and as obviously without relevancy here. Although the plaintiff's witnesses testified that the car was going twelve or more miles per hour, those of defendant asserted otherwise. The jury might have preferred the latter opinion and still be convinced that the rate was such as under the circumstances to amount to want of ordinary care. If so, a case was made responsive to the complaint, and the instruction, read in connection with the rest of the charge, was not subject to the objection stated.

III. Error is assigned upon the refusal of defendant's offered instructions D. 2, D. 5 and D. 9. All that is valuable in these instructions was actually given the jury in the charge. D. 5 contains matter which is gratuitous and irrelevant; while [5] D. 9 creates an impression which is positively vicious. A casual reading of the latter would suggest the view that a street

railway company is never required to stop its cars "even on the discovery of the fright of a horse on the street, when the fright of the horse is occasioned by the usual and ordinary noises of the car." It was said, and properly said, in *Singer v. Missoula St. Ry. Co.*, 47 Mont. 218, 226, 131 Pac. 630, that "it was not incumbent upon the motorman to stop the car when he first observed the plaintiff approaching from the north, or even when he observed that the horse was becoming unmanageable"; but it is the duty of a street railway company in such circumstances to have its cars under such control that they can be stopped when stopping becomes necessary to avoid an accident. The drivers of horse-drawn vehicles have the same right to use the public streets as street-cars or automobiles—neither more nor less; none of them may go blithely along indifferent to the danger of others; but each must be operated so as to prevent doing avoidable injury to others—stopping if and when necessary to that end.

IV. It is finally insisted that the evidence preponderates [6] against the conclusions implied by the verdict of the jury. Judging from the cold record we are inclined to agree that this is so; but we did not see the witnesses or hear them testify as the jury who found for the plaintiff did, and as also did the judge who denied the defendant's motion for a new trial. There was evidence sufficient, if credited, to sustain the plaintiff's case, and the rule is too well settled to require any citation of authorities that in such a situation this court will not interfere.

The judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied October 3, 1917.

AMERICAN SURETY COMPANY OF NEW YORK, RESPOND-
ENT, v. KARTOWITZ, APPELLANT.

(No. 3,794.)

(Submitted July 3, 1917. Decided July 6, 1917.)

[166 Pac. 685.]

*Attachment—Nature of Remedy—Prerequisites—Pleading and
Practice—Complaint—Amendment—Effect—Demurrer.*

Attachment—Nature of Remedy.

1. Attachment is a provisional remedy, ancillary to the civil action in which it is issued.

Same—Time of Issuance.

2. The writ of attachment may issue at the time of issuing summons, or thereafter, but not before.

Same—Prerequisites to Issuance.

3. The necessary requisites for an attachment are the pendency of an action on a contract, express or implied, for the direct payment of money, and an outstanding valid summons issued in such action.

[As to proceedings to dismiss an attachment, see note in 123 Am. St. Rep. 1028.]

Pleading—Complaint—Effect of Amendment.

4. An amended complaint filed after a demurrer to the original one had been sustained and leave to amend granted, supersedes the original pleading and all issues are thereafter determinable as of the date of the commencement of the action, in the absence of supplemental pleadings.

Attachment—Dissolution—Effect of Sustaining Demurrer to Complaint.

5. Where the time within which plaintiff had been granted leave to amend his complaint held insufficient on general demurrer, had not expired, and it was not apparent that the pleading could not be so amended as to properly state the same cause of action ineffectively attempted to be stated in the first instance, motion to discharge an attachment issued at the time the action was commenced, *held* properly denied.

Appeal from District Court, Hill County, in the Twelfth Judicial District; Charles L. Crum, Judge of the Fifteenth District, presiding.

ACTION by the American Surety Company of New York against Herman F. Kartowitz. From an order denying a motion to discharge an attachment, defendant appeals. Affirmed.

Messrs. Stranahan & Stranahan, for Appellant, submitted a brief; *Mr. C. R. Stranahan* argued the cause orally.

Mr. H. S. Kline and *Mr. John H. Lewis*, for Respondent, submitted a brief; *Mr. Charles B. Elwell*, of Counsel, argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The original complaint in this action set forth that plaintiff became surety for defendant on a guardian's bond required of him by the county court of Ward county, North Dakota; that, in consideration of it becoming such surety, defendant agreed to indemnify and save it harmless from all liability; that defendant failed in this behalf; that plaintiff was compelled to and did pay a judgment for \$1,800 and costs and expenses, amounting to \$177, recovered in an action brought against the guardian and this plaintiff; and that defendant has not repaid such amount, or any part thereof, though often requested so to do. At the time the action was commenced the plaintiff secured a writ of attachment to be issued. The trial court sustained a general demurrer to this complaint and granted plaintiff twenty days within which to amend. Before the amended complaint was filed, and within the twenty days allowed for the amendment, defendant moved the court to discharge the attachment. The motion was denied, and defendant appealed from the order.

It is the contention of appellant that, when the demurrer to the original complaint was sustained, the attachment should have been discharged, since there was not then any complaint in the action, and therefore nothing to support the attachment.

Under our Codes, attachment is a provisional remedy in a [1, 2] civil action; it is ancillary to the action in which it is issued. The writ may issue at the time of issuing summons, or thereafter, but not before. (Sec. 6656, Rev. Codes.) The [3] necessary requisites for an attachment are: First, the pendency of an action on a contract, express or implied, for the

direct payment of money; and, second, an outstanding valid summons issued in such action. (*Duluth B. & M. Co. v. Allen*, 51 Mont. 89, 149 Pac. 494.) A civil action is commenced in a court of record by filing a complaint (secs. 6457, 6513, Rev. [4] Codes), but the effect of sustaining a demurrer to the complaint is not to terminate the action. Section 6591, Revised Codes, provides that, when a demurrer is sustained, the court may in its discretion allow the pleader in fault to amend, and that discretion was exercised in plaintiff's favor in this instance. When the amended complaint is filed, it supersedes the original (*Ben Kress Nursery Co. v. Oregon Nursery Co.*, 45 Mont. 494, 124 Pac. 475), and all issues are then determinable as of the date of the commencement of the action, in the absence of supplemental pleadings.

No fault is found with the summons issued in this action; so [5] that, between the date when the demurrer was sustained and the amended complaint was filed, there was still pending an action upon a contract for the direct payment of money, in which a valid summons had been issued at or prior to the time the writ of attachment was secured. This would seem to determine the correctness of the trial court's ruling upon the motion to discharge; but appellant insists that this court has held that to support an attachment there must be on file in the action a complaint which states a cause of action for the recovery of money upon a contract, express or implied, and cites *Porter v. Plymouth Gold Min. Co.*, 29 Mont. 347, 101 Am. St. Rep. 569, 74 Pac. 938, and *Kyle v. Chester*, 42 Mont. 522, 37 L. R. A. (n. s.) 230, 113 Pac. 749. In the first of these cases this court dismissed the subject now under consideration with these remarks: "The question as to the action of the court in dissolving the attachment which was issued at the time the suit was commenced becomes immaterial under the conclusions that we have reached upon the appeal from the judgment. If the complaint did not state facts sufficient to constitute a cause of action, no attachment could be maintained." *Kyle v. Chester* was an action in tort, and in sustaining an order of the trial

court discharging an attachment which had been issued this court said: "But the court must look to the complaint to ascertain whether it states a cause of action in contract, express or implied. The fundamental question is whether the complaint states such a cause of action. As this complaint does not, the attachment was properly discharged."

The observation in each instance was peculiarly pertinent as applied to the facts then under consideration. In the *Plymouth Case* a demurrer was sustained to the complaint, and plaintiffs, electing to stand on their pleading, suffered judgment to be taken against them, and appealed therefrom. It was then too late to amend, if by amendment a good cause of action could have been stated without changing the cause of action. In *Kyle v. Chester* the complaint disclosed on its face that it could not be amended to state a cause of action upon a contract; so that neither case is authority for the principle for which appellant herein contends.

In *Clark v. Oregon Short Line R. R. Co.*, 38 Mont. 177, 99 Pac. 298, the decision of this court is aptly stated in the syllabus as follows: "An action is 'commenced,' within the meaning of section 6457, Revised Codes, and the operation of the statute of limitations is thereby arrested, by filing a complaint to which a general demurrer is afterward sustained, provided the pleading is sufficiently substantial to allow of its being properly amended so as to fully state the same cause of action attempted to be stated in the first instance." Upon principle, that case is in point here.

Under similar statutory provisions the supreme court of California has held that the attachment should not be dissolved unless the complaint cannot be amended to state a proper cause of action. The court said: "The claim that the complaint does not state a cause of action, and that the attachment should have been dissolved for that reason, cannot be sustained. Unless the complaint shows upon its face that the plaintiff has no cause of action with the help of an amendment, the attachment should not be dissolved. If the complaint is defective merely, and can

be made good by amendment, the plaintiff should be allowed to amend before the decision of the motion to dissolve; but, if the complaint is incurable, the attachment must be dissolved.” (*Hathaway v. Davis*, 33 Cal. 161.)

In view of our liberal statute of amendments (sec. 6589, Rev. Codes), and the provision in section 6683, Revised Codes, permitting the affidavit or undertaking on attachment to be amended, the language of the California court above expresses our views of the rule which should prevail here.

Assuming, without deciding, that the court below was justified in sustaining the demurrer to the original complaint, it cannot be said that it is made apparent that the same cause of action attempted to be stated, cannot be properly pleaded in an amended complaint. The order is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

NORTHERN PACIFIC RY. CO., APPELLANT, v. COUNTY OF
MUSSELSHELL ET AL., RESPONDENTS.

(No. 4,029.)

(Submitted June 4, 1917. Decided July 9, 1917.)

[169 Pac. 53.]

Taxation—Mines and Mining Claims—Constitution—Estates in Land—Northern Pacific Land Grant—Deeds—Reservations—Coal in Place—Surface Rights—Ascertainment of Taxable Value—Injunction.

Taxation—Constitution—“Mine”—What Constitutes.

1. *Held*, that the expression “all mines” in the last clause of section 3, Article XII, of the state Constitution, providing that among other things the net proceeds thereof shall be taxed, was intended to apply to all mineral deposits—both those found in lands purchased from the United States under the mining laws, and those obtained by grant or purchase under other laws.

Same—Deeds—Reservations—Coal in Place—Not Taxable.

2. Coal in place, found in lands granted by the government to the Northern Pacific Railway Company, which coal the company reserved

to itself in deeds to portions thereof sold by it, constitutes a mine, and as such, in its undeveloped condition, is not a proper subject for taxation. (See, also, Opinion on Motion for Rehearing, at [6].)

Same—Reservations—Surface Rights Taxable.

3. The right, also reserved in deeds referred to above, to such use of the surface of the land as may be necessary for the exploration, mining and carrying away of the coal that may be found below, is a valuable interest in the land itself, and as such properly subject to taxation.

Same—Surface Rights—Taxable Value—How Ascertained.

4. The taxable value of the right to the use of the surface of the land for the purposes referred to in paragraph 3, *supra*, omitting the deposit from the estimate, is to be ascertained the same as if the entire estate, i. e., the land and the reservations, was vested in the grantee, the assessor to make an equitable apportionment of this value between the grantee and the railway company.

Same—Tax Deeds—Injunction—When Proper Remedy.

5. Where a portion of an assessment, made in a lump sum to plaintiff railway company, was legal and a portion illegal, and the company was unable to ascertain and pay that which was legal, the remedy by injunction to restrain the threatened issuance of a tax deed was available to it.

[As to injunction against sale of property for illegal taxes, see notes in 69 Am. Dec. 198; 49 Am. Rep. 287; 23 Am. Rep. 622; 53 Am. Rep. 110.]

Same—Mines and Mining Claims—Taxable Values.

7. The purchase price of mines or mining claims acquired from the United States is the standard of value for taxation purposes (aside from the annual net proceeds, value of machinery and improvements), unless the surface is used and has a value for other purposes, in which event the latter is the taxable value; if not purchased from the United States, the taxable value is the value of the surface considered as real estate, without reference to mineral content below the surface.

Appeal from District Court of Musselshell County; Chas. L. Crum, Judge.

ACTION by the Northern Pacific Railway Company against the County of Musselshell and the treasurer thereof to restrain the issuance of a tax deed. From a judgment entered after sustaining defendants' demurrer to the complaint, plaintiff appeals. Reversed and remanded.

Messrs. C. W. Bunn, Chas. Donnelly and Gunn & Rasch, for Appellant, submitted a brief; Mr. M. S. Gunn argued the cause orally.

According to the decision in *Northern Pac. Ry. Co. v. Mjelde*, 48 Mont. 287, 137 Pac. 386, a body of coal developed to the extent of producing, or of being capable of producing, is a mine

without reference to the law pursuant to which title to the land in which the coal is contained was acquired from the United States. If, then, the coal in question in this case should be developed into a mine, it could not be taxed while in place in the ground. It follows that the question for consideration and decision is whether such coal before it is developed and exposed, and thereby transformed into a mine, is a proper subject of taxation. To hold that because the coal in question has not been developed it is subject to taxation would be to establish an unreasonable rule of taxation. Such a holding would authorize the taxation of undeveloped coal and mineral when such coal and mineral would not be subject to taxation after being developed. The result of such a rule would be the taxation of property of unknown value and of which no use can be made, while the same property would be free from taxation when developed, its value ascertained and it is placed in a condition for use. If, as we contend, the coal and right to mine the same are not subject to taxation, or if either the coal or the right to mine cannot be taxed, the assessment was unauthorized and is illegal, and the injunction should have been granted. (*Barnard Realty Co. v. City of Butte*, 50 Mont. 159, 145 Pac. 946.)

Thus far we have assumed that the *Mjelde Case* does not decide that undeveloped coal may be taxed. If, however, we are mistaken in this assumption, we earnestly insist that the decision is erroneous and should be overruled, for the reasons already assigned, and for the further reason that it makes a classification of coal for revenue purposes, which is unreasonable and wholly unwarranted.

According to the decision in the *Mjelde Case*, coal in land acquired from the United States pursuant to the coal land laws is not taxable, although not developed. If, then, undeveloped coal in land granted to the Northern Pacific Railroad Company, or other lands, title to which was acquired otherwise than pursuant to the coal land laws of the United States, is subject to taxation, there is clearly a classification solely with reference to the law pursuant to which title was acquired. Such a classi-

fication is wholly arbitrary and is not based upon any difference between the subjects thus classified. Furthermore, such a classification is violative of section 11 of Article XII of the Constitution, which declares that taxes "shall be uniform upon the same class of subjects within the territorial limits of the authority levying the taxes." (*Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150, 41 L. Ed. 666, 17 Sup. Ct. Rep. 255; 1 Cooley on Taxation, 3d ed., 72 *et seq.*; *Southern Ry. Co. v. Greene*, 216 U. S. 400, 54 L. Ed. 536, 30 Sup. Ct. Rep. 287; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679, 22 Sup. Ct. Rep. 431; *Cunningham v. Northwestern Imp. Co.*, 44 Mont. 180-211, 119 Pac. 554, 1 N. C. C. A. 720; *Essex County Park Com. v. Town of Orange*, 77 N. J. L. 575, 73 Atl. 511; *State v. Cudahy Packing Co.*, 33 Mont. 179, 114 Am. St. Rep. 804, 8 Ann. Cas. 717, 82 Pac. 833; *State v. Hoyt*, 71 Vt. 59, 42 Atl. 973; *State v. Richards*, 52 N. J. L. 156, 18 Atl. 582.)

Mr. S. C. Ford, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for Respondents, submitted a brief; *Mr. Woody* argued the cause orally.

An owner's reservation of the minerals in land and the right to the use of surface ground for mining and removing such minerals constitutes property subject to taxation. (Constitution, Art. XII, secs. 16, 17; Rev. Codes, secs. 2498, 2501; *Murray v. Hinds*, 30 Mont. 466, 76 Pac. 1039; *Northern Pac. Ry. Co. v. Mjelde*, 48 Mont. 287, 137 Pac. 386; *Anaconda Copper Min. Co. v. Ravalli Co.*, 52 Mont. 422, 158 Pac. 682.)

Section 2502 of the Revised Codes requires all property to be assessed at full cash value, while the fifth subdivision of section 2501 defines the terms "value" and "full cash value," but nowhere in the Codes is any mode provided for determining or ascertaining the value of property for assessment purposes. In the absence of an express provision as to the mode of ascertaining the valuation of property for taxation purposes, the assessor must exercise his own judgment in determining the valuation of property for such purposes. (*King v. Gwynn*, 14

Fla. 32; *St. Louis V. & T. H. R. Co. v. Surrell*, 88 Ill. 535; *State v. Sterling*, 20 Md. 502; 37 Cyc. 1009, 1010, and cases cited in note.)

Evidently the appellant is seeking by this action to have this court hold that even though appellant has reserved the coal in this land and the right to mine and extract the same, because it is unexplored and undeveloped, the reservation has no value, and is therefore not taxable. This question is completely answered in the case of *In re Major* (*Major v. Pavey*), 134 Ill. 19, 24 N. E. 973.

In practically every state where the question has been before the courts, it has been held that a mineral reservation is an interest in real estate, and in many of these states the courts have also held that the coal or mineral itself may be assessed and taxed. (*Board of Commrs. v. Lattas Creek Coal Co.*, 179 Ind. 212, 100 N. E. 561; *Riggs v. Board of Commrs.*, 181 Ind. 172, 103 N. E. 1075; *Sanderson v. City of Scranton*, 105 Pa. St. 469; *Wolfe County v. Beckett*, 127 Ky. 252, 17 L. R. A. (n. s.) 688, 105 S. W. 447; *Harvey C. & C. Co. v. Dillon*, 59 W. Va. 605, 6 L. R. A. (n. s.) 628, 53 S. E. 928, 941; *Cherokee & P. Coal etc. Co. v. Board of Commrs.*, 71 Kan. 276, 80 Pac. 601; *Consolidated Coal Co. v. Baker*, 135 Ill. 545, 12 L. R. A. 247, 26 N. E. 651; *Graciosa Oil Co. v. Santa Barbara County*, 155 Cal. 140, 20 L. R. A. (n. s.) 211, 99 Pac. 483; *Tiller v. Excelsior Coal & L. Corp.*, 110 Va. 151, 65 S. E. 507.)

Even if the assessor did assess the coal, instead of the reservation, and the taxes were levied and imposed on the coal, instead of on the reservation, the result is exactly the same as if the reservation itself had been assessed and taxed, and in the complaint it is alleged that the treasurer is threatening to execute and deliver to the county, not a deed to the coal, but a deed to the mineral reservation.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This is an appeal from a judgment rendered and entered after an order sustaining defendants' demurrer to the complaint

and denying plaintiff an injunction. The facts alleged as grounds for relief are these:

On August 27, 1908, the plaintiff conveyed to one Magnus Lindstrand section 35, township 8 N., range 25 E., in Musselshell county, reserving "all coal and iron upon or in said land, and also the use of such surface ground as may be necessary for the exploring for and mining or otherwise extracting and carrying away the same." In the year 1913 the assessor of Musselshell county assessed the reservation so made, for the purpose of taxation, at a valuation of \$18 per acre, making a total valuation of the reservation for the entire section of \$11,520. The amount of tax levied for that year was \$276.48. The plaintiff having failed to make payment, the reservation was sold by the treasurer and bought in for the county in January, 1914. For each of the years 1914, 1915 and 1916, the reservation was again assessed at the same valuation. Taxes were levied as in 1913, but were not paid. The land contains coal. This, however, has never been explored or developed, and, it is alleged, the quantity, quality and value of it are speculative and matters of opinion. No use of the surface of the land for the purposes stated in the reservation has ever been made by the plaintiff. It is alleged: "That the assessor in making said assessment in the year 1913 and said other assessments took into consideration and fixed and determined the valuation of such reservation on the basis of the quantity and quality of the coal in said land and the value thereof according to his opinion, and did value and assess said coal, and said taxes for which said property was sold were imposed and levied upon said coal and other property so reserved." The defendant treasurer of the county threatens to make and deliver to the county a tax deed conveying to it the reservation including the coal. To prevent this action on his part, and thus the casting of a cloud upon plaintiff's title, this action was brought.

The theory upon which the action proceeds is that the tax is wholly illegal, and hence that under the decision in *Barnard Realty Co. v. City of Butte*, 50 Mont. 159, 145 Pac. 946, the

remedy by injunction is available, without allegation and proof of the fact that an unsuccessful application has been made for relief to the board of county commissioners while sitting as a board of equalization. The inquiry presented by the appeal therefore is whether the reservation in the deed which includes only coal in an undeveloped condition and not yet transformed into a mine, is a proper subject for taxation. The same inquiry was before this court in the case of *Northern Pac. Ry. Co. v. Mjelde*, 48 Mont. 287, 137 Pac. 386. That this is so is shown by the statement in the opinion in that case of the question to be determined as follows: "We are called upon to determine whether that which the company reserved to itself in each of these parcels of land, constitutes property which is subject to taxation." The reservation to which this reference was made included "all mineral of any nature whatsoever" as well as coal and iron; but this fact does not distinguish it from this case. Neither is it distinguishable from this case by the fact that there were therein considered two reservations, one of which was in land assumed to contain coal, whereas it was not known what the contents of the other were. It was then definitely determined that such a reservation is an interest in real estate, and is subject to taxation. It was also determined that the reservation is not a mine nor a mining claim, within the language employed in section 3 of Article XII of the Constitution. It was held further that the expression "mining claim," as used therein, means a tract of land to which the right of possession or title has been acquired under the laws of Congress providing for the sale of mineral lands as such, including coal lands, and that the term "mine" means a mining property so developed as to yield, or to be capable of yielding, a profit. The term "mine" was thus construed as broad enough to include within its scope and meaning any developed and producing body of ore, without reference to how the title to the land in which it is found has been acquired. The language employed in this connection is the following: "The character of legislation, under which title or right of possession is acquired, is not a controlling factor at

all. A mine upon a patented homestead is not less a mine because title from the government was acquired under laws providing for the disposition of agricultural lands only; and an undeveloped body of ore is not a mine, though title to it was secured under the mineral laws, but it is merely a part of the real estate itself. In providing a fundamental law for the new state, the framers of our Constitution spoke in comprehensive terms; but we decline to believe that they used the word 'mine' in section 3 in a sense which would include hidden, unknown, or undeveloped deposits of ore or coal. In that section they spoke with reference to revenue and referred to something which would or might produce revenue in its present state of development." If this is accepted as the correct meaning of the term, all mines as distinguished from mining claims, wherever they are found, if developed, are put in the same class for the purpose of taxation. Nevertheless we held, not directly but impliedly, that, until developed, ore bodies underlying land obtained from the federal government by grant or conveyance under other than the laws relating to the disposition of mineral lands, are an element of value of the land, and are to be taxed as a part of it. The final conclusion was stated as follows: "In the absence of any allegation bringing either of these rights [the two reservations under consideration] within the definition of a mine, or disclosing that they are, or either of them is, valueless, the complaint fails to state a cause of action. If this conclusion in its ultimate analysis involves a classification of property, which will result in denying to any person within this jurisdiction the equal protection of the laws—and we do not think that it does—the responsibility must rest upon the framers of our Constitution, who, in their zeal to promote the mining industry, arbitrarily gave to mines and mining claims a status before the law not enjoyed by other species of property."

That decision is conclusive of this case, if based upon a correct conception of the purpose had in view by the constitutional convention. Upon a more mature consideration of the subject, however, aided by the light shed upon it by a study of the de-

bates which occurred at the time of the formulation of the Article relating to revenue (Article XII), we are convinced that our conclusion is not entirely in accord with the aim of the convention. As expressive of the purpose that all property should bear its just proportion of the burden of supporting and maintaining the government, the convention adopted section 1. Under this it became the duty of the legislature to provide for a uniform rate of assessment and taxation, upon a just valuation of all property, except as otherwise provided in other sections of the Article. By section 16 it was made the duty of the legislature to provide generally the manner of assessment, except as otherwise provided, there being added a specific provision as to who should assess railroad property. In section 17 the convention defined the meaning of the term "property." In section 2 it provided for exemptions, enumerating what property was to be absolutely exempt, and what the legislature might in its discretion exempt. The purpose of section 3 was to provide a special method for the assessment and taxation of mining property. The making of the special provision on the subject shows conclusively that the convention was of the opinion that this species of property, though falling generally within the definition of "property" as made in section 17, could not be justly dealt with by the method provided for other real property, and therefore must be valued and taxed by a method which would accomplish this desired result. The theory adopted was that it should be regarded as of a mixed quality—real as to the surface value, and personal as to the subsurface contents of it. This is apparent from a reading of it: "All mines and mining claims, both placer and rock in place, containing or bearing gold, silver, copper, lead, coal, or other valuable mineral deposits, after purchase thereof from the United States, shall be taxed at the price paid the United States therefor, unless the surface ground, or some part thereof, of such mine or claim, is used for other than mining purposes, and has a separate and independent value for such other purposes, in which case said surface ground, or any part thereof, so used for other than mining purposes, shall be

taxed at its value for such other purpose, as provided by law; and all machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims which have a value separate and independent of such mines or mining claims, and the annual net proceeds of all mines and mining claims shall be taxed as provided by law." In order that no value should escape from taxation, the surface value was arbitrarily fixed at the price paid for it to the government; the convention presuming, of course, that ordinarily mining property would have no value for any purpose other than for mining. In other words, in their estimation it would have no value except, when it would be in condition to produce profit. That such other value as it might derive from its use for residential, manufacturing and agricultural purposes, it was determined must be ascertained as if it were real estate, and added to the purchase price. The machinery and other improvements put upon the surface and having an independent value, it was determined should be valued as improvements upon other property. To this extent the valuation and assessment were to be ascertained under the provisions of law applicable to other real property. As to the subsurface contents, the theory was adopted that they should be regarded as having no taxable value other than so far as they might add to the resources of the owner by the yielding of a profit. Hence the last clause was added which in effect made an exemption of the contents from taxation so long as they should not prove a source of profit by being extracted and converted into personal property. This theory necessitated the devising of a method of ascertaining the net profits, and a mode by which their taxable value might be ascertained, a levy thereon made and the collection of it enforced, at a rate uniform with that laid upon all personal property. That the convention determined that such property, when not a source of profit to the owner of the surface, should not be subject to taxation is made clear as well by the previous legislation on the subject as by the special scheme devised in section 3. (*Northern Pac. Ry. Co. v. Mjelde, supra.*) In announcing our conclu-

sion in his case we were of the opinion that in adopting section 3, the convention intended to be understood as confining its application exclusively to mines purchased from the United States. If, however, the definition of the term "mine," as adopted in the *Mjelde Case*, is correct—and we think it is—it is broad enough to include mines wherever found.

The debates had in the convention are not easily accessible because they have not yet been published. Previous to the adoption of section 3, however, there was much diversity of opinion among the members. Some of them advocated the elimination of any special provision on the subject of mines and mining claims; these entertaining the opinion that mineral deposits should be taken into the estimate as an element of value, whether they had been developed or not. The adoption of this plan would have put all lands into the same class. Others, and by far the larger number, advocated the adoption of section 3, upon the theory that however rich a deposit might apparently be or was supposed to be, the real value was at best a matter of speculation; that it was varying and uncertain; that it might be of great apparent value to-day and by to-morrow of no apparent value—this because of changed conditions found in the earth in the process of development, and because in its undeveloped state no intelligent estimate of its value could be made by the assessing officer. While the discussion had special reference to land acquired under the laws relating to mineral lands, it disclosed a purpose to devise a method by which all property could be made to bear its just burden under an ascertainable value, as well as a definite purpose to avoid leaving the ascertainment of the value of any of it to speculation which would vary in result as widely as the individual opinions or judgments of different assessors, and thus result in valuations in no sense uniform as to that particular class of property. The language of the section is not expressed in the most apt and appropriate terms; but we are of the opinion that the expression "all mines," as used in the last clause of it, was intended to apply to all mineral deposits, and to put them in the category of personal property; the margin

over and above the cost of extraction only to be taxed at a value to be ascertained by visual inspection or mathematical calculation. In any event, it is broad enough to include all, both those found in lands purchased from the United States under the mining laws, and those obtained by grant or purchase under other laws. Indeed, there is no reason to suppose the convention, in devising a method for the taxation of mineral deposits, gave careful attention exclusively to mines and mining claims purchased as such, omitting all consideration of those acquired by other modes, though many members must have had knowledge of the existence or possible discovery of the latter. We must conclude that the members were fully informed that the grant of lands now held by the plaintiff included coal and iron. We must conclude, also, that they knew that lands acquired by settlers under the homestead and other laws relating to the disposition of agricultural lands were possibly underlaid with mineral deposits. Presuming that they had this knowledge, it would be doing violence to their intelligence to conclude that they arbitrarily and without reason left such deposits to be valued and taxed according to the varying opinions of different assessors, without considering whether they could be made a source of actual profit. It is more reasonable to suppose that by the use of the general language employed in the last clause, they intended to include all mineral deposits, and to declare that their taxable value should be their productive value after development. It is more reasonable also to conclude that they intended to classify mines as such, rather than that they intended to classify them with reference to the law by which title was acquired, and thus leave themselves open to the imputation that they made an arbitrary classification. This would necessarily have been the result, for it would follow that coal lands acquired under the law providing for their disposition as such would be taxable under section 3, *supra*, whereas a homestead adjoining would be taxed upon its undeveloped coal as an element of value.

So far as these views are in conflict with the final conclusion announced in the *Mjelde Case*, the latter is to be considered as

overruled. It does not follow, however, that the reservation in [3] controversy is without any taxable value. The right reserved to the use of the surface is of substantial value and may be availed of at any time. It includes so much of the surface as may be necessary to explore, develop and extract either coal or iron; the extent or duration of the use being limited only by the extent of the deposit. This necessarily detracts from the value of the land to the plaintiff's grantee, and to this extent it is an interest in the land itself, and is properly the subject of taxation. (Const., Art. XII, sec. 17; Rev. Codes, secs. 2498, 2501.)

This brings us to the question: How is its value to be ascer- [4] tained? The only answer is that the cash value of the land, omitting the deposit from the estimate, is to be ascertained as if the entire estate or land as vested in the grantee, and an equitable apportionment of this value made by the assessor between the grantee and the plaintiff.

It is contended by the Attorney General that though the coal [5] deposit was improperly included by the assessor as the principal element in ascertaining the value of the reservation, inasmuch as the surface right was taken into consideration also, the assessment was valid in part, and hence that the complaint does not state a case for relief by injunction, because it is not alleged therein that the plaintiff applied to the board of county commissioners while sitting as a board of equalization for relief from the illegal portion of it. To support this contention he cites and relies upon the case of *Danforth v. Livingston*, 23 Mont. 558, 59 Pac. 916. In that case complaint was made of an overvaluation, and it was properly held that in such a case relief by injunction would not be granted, unless the overvaluation was the result of arbitrary action or fraud by the assessor, and the board had refused relief. That case is not in point here. The question presented here is whether an injunction will be granted to restrain the issuance of a deed to the purchaser at a tax sale, when the tax to enforce the collection of which the sale was made was in part illegal. Where such a tax is wholly illegal, the sale may

be enjoined. (*Barnard Realty Co. v. City of Butte, supra.*) The conclusion reached in that case was held permissible under section 2741 of the Revised Codes, which, though prohibiting generally the issuance of an injunction to restrain the collection of a tax, nevertheless permits the issuance (1) when the tax is wholly or in part illegal or unauthorized by law, and (2) when the property is exempt. In the first case, if any part of the tax is illegal, it must appear that this part has been paid. This presumes, of course, that the legal and illegal portions are separable and the legal part is ascertainable. Here the case is presented of a gross sum, the legal part of which cannot be ascertained and paid. Clearly the plaintiff ought to have paid the part of it due upon the surface right, but since it could not ascertain what amount was apportioned to this part of the reservation, it could not comply with the statute.

We know of no case in which the same question has been examined and determined. We think, however, that under the anomalous situation in which the plaintiff finds itself, it ought not to be denied the relief demanded. Hence we conclude that the district court erred in sustaining the demurrer, and that the judgment should be reversed.

It is proper to say of the *Mjelde Case* that in determining it this court did so on the theory that undeveloped coal deposits ought to be considered an element in ascertaining the value of the land in which they are found, and that the levy had been properly made. It is also proper to say that in view of the conclusion announced therein, the district judge was fully justified in sustaining the demurrer and denying the injunction.

MR. JUSTICE HOLLOWAY concurs. .

MR. JUSTICE SANNER concurs in the result.

ON MOTION FOR REHEARING.

(Submitted October 2, 1917. Decided December 12, 1917.)

MR. JUSTICE SANNER delivered the opinion of the court.

The motion for rehearing in this case proceeds upon the assumptions that this court by its opinion has overruled *Northern Pacific Ry. Co. v. Mjelde*, 48 Mont. 287, 137 Pac. 386, and has in effect decided that reservations such as the one here involved are not taxable. The briefest glance at the opinion will suffice to dispel the latter assumption, while the former is equally groundless, as we shall endeavor to show.

In the *Mjelde Case* two sections of land conveyed to different grantees were involved; one supposed to contain coal, whereas the presence of coal in the other was unknown. The question before the court was "whether that which the company reserved to itself in each of these parcels of land constitutes property which is subject to taxation under the Constitution and laws of this state." The company claimed immunity on the ground that the subject of the reservations—coal in place—is a mine within the meaning of section 3, Article XII, of the state Constitution, taxable as such only when there are net proceeds. Manifestly this did not, and could not, meet the issue, because it ignored the interest in real estate, regardless of coal-content, asserted by the reservations. We held them to be taxable as an interest in real estate, saying, *arguendo*, that a mining claim is a tract of land to which title and right of possession has been acquired under the mineral or coal land laws of the United States; that a mine, in the revenue sense as employed in section 3, "is a mineral deposit, whether metallic or nonmetallic, developed to the point of production and actually yielding, or capable of yielding, proceeds"; that the character of legislation under which title has been acquired has nothing to do with the existence or nonexistence of a mine; and that coal in place and undeveloped is not a mine. These reflections lead to an interesting situation which may be exemplified as follows: Smith owns a tract acquired under

the homestead laws, and the assessor thinks it contains valuable deposits of coal; it is not a mining claim, because not acquired under the mineral or coal land laws; it is not a mine, because the deposit has not been developed to the point of production. The assessor, however, rates it not only upon the surface value for agriculture, but additionally upon the supposed value of the coal deposit; Smith is compelled to pay accordingly, but, driven by the exactions, opens up the deposit, brings it to the point of production, makes it capable of yielding proceeds, which proceeds, however, are inadequate to pay the cost of operation; it is then a mine, but not taxable, because there are no net proceeds. Can it be that such a result was within the contemplation of section 3, Article XII? That a burden may be imposed upon Smith in consequence of pure speculation, only to be relieved when, at a further burden, he has shown its utter futility? In the revenue sense it is doubtless true that a mine is a deposit of coal or mineral developed to the point of yielding net proceeds; but it is no less a mine because development has not reached or has passed that point. The very use of the term "mine" in collocation with the phrase "net proceeds" implies that there may be, as there are, mines with net proceeds, mines without net proceeds, mines with no proceeds at all; and the last are familiar spectacles on many hillsides. In point of fact, the discussion of the meaning of the term "mines" was not essential to the conclusion reached in the *Mjelde Case*, for several reasons, among them this: There was nothing to show that the assessment had been based, in whole or in part, upon assumed coal or mineral content—a fact which forms the very foundation of the present controversy. We took occasion to point out, however—and these are the true data of the decision—that the provisions of Article XII of the Constitution, including section 3, are designed to aid, not to prevent, the raising of public revenue; that the reservations constitute property with a value, taxable because not exempt, and that the difficulty which might confront the assessor in ascertaining the value is no bar to such taxation. From these postulates there is no recession in the

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[6] instant case, notwithstanding it is now held that the coal reserved constitutes a mine subject to taxation as such.

That we are justified in the position taken, if not in all the language employed, will, we think, be granted by whoever may consider the premises. The reservation in question is dual: A corporeal hereditament, as to the coal and iron; an incorporeal hereditament, as to the right to enter the lands conveyed, to explore for coal or iron, and to extract the same when found, using so much of the surface as may be necessary. In the nature of things, the latter could not be a mine, but it is property, presumably valuable, not exempt, and therefore taxable as an interest in realty; and the difficulty which may confront the assessor in ascertaining the value can be no bar to such taxation. With the former, however—the corporeal hereditament—the situation is somewhat different. It, too, is property; but it consists, by the hypothesis, of coal or iron in place; coal or iron in place may be a mine in a proper sense of that term (*Colorado Coal & Iron Co. v. United States*, 123 U. S. 307, 327, 328, 31 L. Ed. 182, 8 Sup. Ct. Rep. 131; *Davis v. Weibbold*, 139 U. S. 507, 518, 35 L. Ed. 238, 11 Sup. Ct. Rep. 628; 1 Lindley on Mines, 3d ed., 136), and we are convinced that it is such within the meaning of the word as used in section 3 of Article XII.

Distinguished counsel for respondents asserts that the conclusion reached in the opinion ignores or annuls the important phrases, “after purchase thereof from the United States,” and “at the price paid the United States therefor.” Quite the contrary is true. We considered these phrases most carefully, and we give to them the place and meaning which their words and context demand. They have to do with mines and mining claims acquired under the mineral or coal land laws of the United States, and are designed to furnish a basis for taxing the surface only of such lands in the event—frequent, as a matter of fact—that the surface may have no other value. To give them a different application, to say they restrict the net proceeds basis to mines so acquired, would compel the lack of

uniformity and the unreasonable classification mentioned by the Chief Justice. Under section 3, Article XII, all mines and [7] mining claims are to be taxed; this because they are property, and all property not exempt is subject to taxation. They are to be taxed upon their annual net proceeds without regard to the source of title or to whether the operator has title; if there are no net proceeds, either because development has not progressed so far or for any other reason, then, for the time being, this basis of taxation is in abeyance. They are also to be taxed upon the value of the machinery and improvements used in connection with them, if there are any. Finally they are to be taxed upon their surface (a) if bought from the United States, at the price paid therefor, unless (b) such surface is used and has a value for other than mining purposes, in which event they are taxable at such value; or (c) if not bought from the United States, then at the value of such surface considered as real estate, without reference to mineral content below the surface.

It follows, too, that the taxable value of the incorporeal part of the reservation is to be deducted from the whole value of the surface; or, as stated in the opinion, "from the cash value of the land, omitting the deposit from the estimate," because the rights reserved—apart from the deposit—all relate to the surface and limit the owner's dominion over the surface.

It is said in the opinion that such value as the surface of a mine or mining claim purchased from the United States may have for other than mining purposes must be added to the purchase price and taxed accordingly. This was an inadvertence. Our view, as stated above, is that the purchase price in such cases is the standard of value, unless the surface is used and has a value for other purposes, in which event the latter is the taxable value.

With the clarification suggested above, we feel constrained to adhere to the decision.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

ROBERTS, RESPONDENT, v. SINNOTT, APPELLANT.

(No. 3,739.)

(Submitted March 20, 1917. Decided July 9, 1917.)

[169 Pac. 49.]

Appeal and Error—Practice and Procedure—Record on Appeal—Contents—Service—Evidence—Error in Admission and Exclusion—Appeal from Judgment—Appeal from New Trial Order—Exhibits—Identification of Refused Instruction—Statutes.

Appeal and Error—Record on Appeal—Contents—Service.

1. On an appeal taken under the provisions of Chapter 149, Laws of 1915, the transcript must, under section 2, contain the evidence "requisite for the purposes of the appeal," which transcript appellant is required, under the rules of the supreme court, to serve on the respondent. (See Opinion on Motion for Rehearing.)

Same—Evidence—Error in Admission or Exclusion—Record on Appeal.

2. Assignments of error relating to the admission and exclusion of evidence cannot, under the above Act, be considered where the evidence "requisite" for their consideration is not presented in the transcript on appeal. (See Opinion on Motion for Rehearing.)

Same—Refusal of Instruction—Record on Appeal.

3. An assignment of error based on the refusal of an instruction may not be considered on appeal where the instruction is not identified or presented in the manner commanded by section 6746, Revised Codes.

Same—Denial of New Trial—Record on Appeal.

4. An assignment of error relating to an order denying appellant a new trial cannot be sustained where no error is made apparent in the judgment-roll, and in the absence of the evidence from the transcript. (Section 2, Chapter 149, *supra*.) (See Opinion on Motion for Rehearing.)

ON MOTION FOR REHEARING.

Appeal and Error—Defective Record on Appeal—Correction on Terms.

5. *Held*, that the rule that unless the record on appeal conforms to the requirements of the statute the supreme court has no jurisdiction to entertain the appeal, is abrogated by Chapter 149, Laws of 1915; *held*, further, that any defect or insufficiency, short of a total disregard of the law, is now subject to correction upon terms suitable to the offense.

Same—Practice—Record on Appeal from Judgment.

6. If, under the above Chapter, the appeal is from a judgment and raises only errors of law appearing on the face of the judgment-roll, the appellant may rest upon the judgment-roll submitted as his transcript; but his adversary may bring up the stenographer's report of the trial to show that, notwithstanding appearances, the assigned errors were in reality of no substantial consequence.

Same—Practice—Record on Appeal from New Trial Order.

7. If, under the Act *supra*, the appeal is from an order refusing a new trial, urging errors of law occurring at the trial, the appellant will

propose for his transcript not only the judgment-roll and his settled bill of exceptions, if there be one, but also any other proceedings, including such parts of the stenographic record as he thinks proper or necessary, and his adversary must propose, and have incorporated in the transcript, such additional matters as he thinks necessary to show that the supposed errors were cured, corrected or inconsequential.

Same—Practice—Insufficiency of Evidence—Record on Appeal.

8. If the appeal under such statute seeks to present the insufficiency of the evidence, it will be necessary to incorporate all the evidence in the transcript on appeal.

Same—Practice—Exhibits—Record on Appeal.

9. If, on such appeal, a question arises touching the accuracy of any paper or document set out in the transcript, the original, if not a part of the judgment-roll, may be brought up by either party, or, if a part of the judgment-roll, by the supreme court; and when there is a doubt in the mind of the court as to whether the transcript is accurate or ample, or whether any error was substantial or has been compensated, the court may resort to the stenographic record, if brought up, to set that doubt at rest.

Same—Refusal of Instruction—Identification—Record on Appeal.

10. *Held*, that Chapter 135, Laws of 1915, providing what shall be deemed excepted to, was not designed to modify the provision of section 6746, subdivision 5, so as to do away with the necessity of identifying or authenticating in the transcript on appeal an instruction which was refused.

MR. JUSTICE HOLLOWAY, Dissenting.

Appeal from District Court, Jefferson County, in the Fifth Judicial District; Jno. B. McClerman, a Judge of the First District, presiding.

ACTION by Paul H. Roberts against Clarence C. Sinnott. Judgment for plaintiff. Defendant appeals from the judgment and from an order denying a new trial. Affirmed. On motion for rehearing, order of affirmance vacated on condition that appellant file a proper transcript on appeal.

Messrs. Day & Mapes, for Appellant, submitted a brief; *Mr. E. C. Day* argued the cause orally.

Messrs. Kelly & Kelly, for Respondent, submitted a brief; *Mr. D. M. Kelly* argued the cause orally.

HONORABLE W. H. POORMAN, a Judge of the First Judicial District, sitting in place of the Chief Justice, delivered the opinion of the court.

This is an appeal from the judgment in favor of the plaintiff and from an order overruling defendant's motion for a new

trial. The action is to foreclose a mechanic's lien and to obtain judgment against defendant for an alleged balance claimed to be due upon certain contracts for the construction by plaintiff, for defendant, of a dwelling-house. The case was tried to a jury and a verdict returned in favor of plaintiff.

The notice of intention to move for a new trial specifies as the grounds thereof: (a) Insufficiency of the evidence; (b) that the verdict is against law; (c) errors in law occurring at the trial, *etc.* The errors assigned on this appeal relate to (1) the admission of evidence over defendant's objection; (2) striking out of evidence, over objection of defendant; (3) refusal to give defendant's instruction No. 14; (4) error in overruling defendant's motion for a new trial.

It is maintained by appellant that the appeal is taken under the provisions of Chapter 149 of the Laws of the Fourteenth Legislative Assembly. The respondent maintains that the judgment appealed from should be affirmed or the appeal dismissed, for the reason that the record presented is not sufficient to enable the court to consider any of the errors assigned.

It is disclosed by the record that on the tenth day of July, 1915, appellant served notice on the respondent that he desired to incorporate in his transcript all of the stenographer's notes of the testimony taken on the trial, and that he would also require the clerk to certify to the supreme court the original exhibits on file in the case, "and that these documents and exhibits will be used on the appeal, instead of the bill of exceptions or statement pursuant to the provisions of Chapter 149 of the Laws of the Fourteenth Legislative Assembly."

On the tenth day of September, 1915, the "transcript on appeal" was filed in the supreme court, and the same was within the time required served upon the attorneys for the respondent. This transcript on appeal contains the judgment-roll and some other papers, but does not contain any of the testimony in the case. The transcript was printed. A transcript of the evidence was made by the stenographer, which was, on August 31, 1915, agreed to by the counsel for appellant and respondent as cor-

rect. This stenographer's transcript was not printed, and never was served upon the counsel for respondent, but was filed in this court on September 10, 1915. There is not any record of appellant's proposed instruction No. 14 except the fact that there appears in the transcript on appeal an instruction bearing that number, and there is not any record that the same ever was presented to the district court or was ever passed upon by that court. There is not any doubt of the insufficiency of this record, under the statute and the rules relating to appeals, unless the same is made sufficient by the provisions of the law above referred to (Chapter 149, Laws of 1915).

Section 1 of this law provides: "All pleadings, docket entries, minute entries, judgments, all the minutes of the trial court, including all papers and files, all testimony, exhibits and other evidence, whether settled in a bill of exceptions or statement of the case or not, shall be deemed to be brought up by an appeal and to be subject to review, and to be deemed part of the record on appeal in all cases. * * * The supreme court may ordain rules to regulate the manner in which any such papers may be brought up. In the absence of such rules, the following procedure may be followed." It is then provided that if the appellant desires to incorporate in his transcript all or any part of the stenographer's notes or transcript, or any paper not appearing in the judgment-roll, or any bill of exceptions or statement of the case, he shall file and serve a *praecipe*, stating what papers and what, if any, part of the stenographer's notes or transcript he desires to have incorporated in the transcript on appeal. The respondent may then serve and file a *praecipe*, stating what additional matters or other evidence he desires to have incorporated in the transcript. The transcript shall then be composed of the matters so designated, and of the judgment-roll.

The supreme court has not, since the enactment of this Chapter, ordained any rules relating to appeals; nor does the statute conflict with the rules of court theretofore existing relating to the service and printing of transcripts on appeal. Section 2 of the Act makes provision for "a stenographer's transcript," and

contains statements to the effect that the said stenographer's transcript, when authenticated as required by the Act, may be filed with the clerk of the supreme court, "and shall then be deemed to be before the supreme court for all purposes of the appeal," etc. "Such stenographer's transcript may be referred to by the supreme court for the decision of any matter before the court, including questions of the sufficiency of the evidence, and regarding the settlement of instructions, as fully as if it had been [made a] part of a bill of exceptions or statement of the case, as well as to supplement the record or correct any insufficiency or defect therein. This provision, however, shall not be construed as relieving the appellant from having the same printed as a part of the transcript on appeal, when requisite for the purpose of his appeal, nor relieve the respondent from the necessity of specifying in his *praecipe* what, if any, parts or additional parts of such stenographer's transcript he desires incorporated in the transcript on appeal by the clerk of the district court."

Section 1 of the Act relates to the "transcript on appeal," which, under the rules of this court, must be served on the adverse party; and section 2 relates to the "stenographer's transcript," and not any provision is made, either in the Act or in the rules of the court, for its service. Section 1 gives direction as to what papers may be included in the transcript, and specifically provides that, if any parts of the stenographer's notes are required to be incorporated, the same must be specified in the *praecipe*.

Section 2 gives authority for the filing of the stenographer's transcript, and specially provides that this provision shall not be construed as relieving the appellant from having the same incorporated as a part of his transcript on appeal. Whatever [1] else this section 2 may mean, it certainly does mean that the evidence "requisite for the purposes of" the appeal should be "incorporated in the transcript on appeal," and under the rules of this court such transcript must be served on the respondent. A transcript, it is true, may consist of more than one volume, but it must be made up as provided by law.

Appellant's assignments of error Nos. 1 and 2, relating to the [2] admission and exclusion of evidence, cannot be considered for the reason that the evidence requisite for their consideration is not in the transcript on appeal.

Assignment No. 3, relating to defendant's proposed instruction [3] No. 14, cannot be considered, for the reason that said instruction is not identified or presented in the manner commanded by the statute, section 6746, Revised Codes. (*Robinson v. Helena L. & Ry. Co.*, 38 Mont. 222, 99 Pac. 837.)

Assignment No. 4, relating to the order overruling defendant's motion for a new trial, cannot be sustained, for the reason [4] that no errors are apparent in the judgment-roll, and the evidence is not in the transcript on appeal as required by said Chapter 149.

The judgment and order appealed from are affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

MR. CHIEF JUSTICE BRANTLY being absent, did not hear the argument and takes no part in the foregoing decision.

ON MOTION FOR REHEARING.

(Submitted October 2, 1917. Decided December 11, 1917.)

MR. JUSTICE SANNER delivered the opinion of the court.

Further consideration of this case on motion for rehearing convinces us that, while the conclusions announced touching the meaning of Chapter 149, Session Laws of 1915, are correct so far as they go, the final order of affirmance is too drastic. The appeals were sought to be taken under the provisions of that Act, and it is confessed by the opinion itself, as well as generally notorious, that the Act is not easy to construe. Being on the statute books, however, the appellant was entitled to follow it if he could, and he ought not to be deprived of a hearing on the

merits merely because he has failed to properly apply it at the first attempt. We have been doubtful and hesitant ourselves, and the appellant's perplexities are apparently not different from ours. For these reasons we have decided to vacate the order of affirmance and to hear the appeals, provided the appellant shall within thirty days hereafter serve and file such a transcript as the Act requires. That he may do this, and for the information of litigants, generally, we proceed to state what the Act means, according to our present understanding of it.

Reduced to its lowest terms, the Act provides:

(a) "All pleadings, docket entries, minute entries, judgments, all the minutes of the trial court, including all papers and files, all testimony, exhibits and other evidence, whether settled in a bill of exceptions or statement of the case or not, shall be deemed to be brought up by an appeal and to be subject to review, and to be deemed part of the record on appeal in all cases." This is clear and comprehensive. It means that all the proceedings in the court below may be brought up and submitted for consideration by either party on any appeal whatsoever. It is, and was intended to be, a distinct departure from the only system theretofore recognized whereby this court was restricted in its investigations to what was made to appear upon the judgment-roll, or in a settled bill of exceptions, according to the nature of the appeal.

(b) "It shall not, however, be necessary actually to bring all such papers before the supreme court, or to print them; only such as may be material or proper or necessary to be considered on the appeal need be brought up or printed." In other words, although the entire proceedings in the trial court are "deemed" before the supreme court, only such of them are in reality there as are actually brought up.

(c) "If the appellant desire to incorporate in his transcript
 * * * any paper or matter not appearing in the judgment-roll or in a bill of exceptions * * * he shall serve * * * and file * * * a *praecipe* stating what * * * he desires to have incorporated; * * * thereafter * * * any

other party to the case * * * may serve * * * and file * * * a *praecipe* specifying what other matters * * * he desires to have incorporated; * * * a transcript of the papers so designated * * * shall * * * be deemed sufficient for all purposes of the appeal. * * * In case of disagreement between parties regarding the insertion of any matter in the transcript or its omission, the question * * * shall be * * * settled by the judge who tried the case or * * * the supreme court * * * if it shall deem proper.” The effect of this is to recognize that the formal and sufficient record may consist of the judgment-roll, with or without a settled bill of exceptions, depending upon the character of the appeal; to prescribe the method by which is actually brought up to the supreme court so much of the proceedings not so presented as may be material, proper or necessary to be considered, and to say that the matter so brought up, with the judgment-roll or bill of exceptions as the case may be—printed or not as the rules require—constitutes the formal record or transcript on appeal.

(d) “In any case where the proceedings * * * have been reported by the official stenographer * * * and his notes shall have been transcribed and filed * * * and * * * certified by the court or judge as correct * * * or agreed to by * * * the attorney such transcript may at the request of either party be forwarded to the clerk of the supreme court with the transcript on appeal. * * * Such stenographer’s transcript may be referred to by the supreme court for the decision of any matter before the court * * * as fully as if it had been part of the bill of exceptions * * * as well as to supplement the record or correct any insufficiency or defect therein. This provision, however, shall not be construed as relieving the appellant from having the same printed as part of the transcript on appeal when requisite for the purposes of his appeal, nor relieve the respondent from the necessity of specifying in his *praecipe* what if any parts or additional parts of such stenographer’s transcript he desires incorporated in the

transcript on appeal." This means that, for the information of this court, to be consulted or not as the court may think proper or necessary, the stenographer's report, or any part of it, may be brought up as matter collateral to the transcript on appeal. It need not be printed when so brought up, but, though either party may refer to it, neither party has any right to have it made the basis of decision unless he has caused its incorporation in the transcript on appeal.

(e) "In all cases of insufficiency or other defectiveness in the transcript or papers on appeal, the appellant or other party in interest may be allowed to complete or correct the same. * * * In all such cases, the supreme court may impose such terms, costs or penalties upon the party responsible * * * as to the court may seem proper." The result of this provision is [5] greater than appears at first glance, for it means not only what the words imply; it also removes a barrier which has heretofore prevented this court from authorizing more than merely formal corrections, or corrections resulting from suggestion of diminution. The rule announced in *Cornell v. Matthews*, 28 Mont. 457, 72 Pac. 975, and many preceding cases, that this court is without jurisdiction to hear the appeal unless the record is made up in compliance with the provisions of statute in that behalf, exists no longer; but any defect or insufficiency, short of a total disregard of the law, is now subject to correction upon terms suitable to the offense. This is as it should be.

Summing up the whole Act, the general purpose is apparent. It is to make it possible for either party to show that any given appeal is or is not meritorious and thus to further and extend the public policy of this state as expressed in section 9412, Revised Codes, and repeated decisions of this court. In short, the Act is in furtherance of justice, so far as justice may be done by this court exercising its constitutional functions of a court of review.

It is to be observed, however, that while the field of investigation is thus broadened, the canons of judgment in any appeal are in no wise changed. We are still to determine whether re-

versible error has occurred; whether the evidence supports the verdict; whether the judgment is in accordance with law. Realizing this, it is not impossible to apply the provisions of the [6] Act to the practice. If, for example, the appeal is from a judgment and raises only errors of law appearing on the face of the judgment-roll, the appellant may rest upon the judgment-roll submitted as his transcript; but his adversary may bring up the stenographer's report of the trial to show that notwithstanding appearances, the assigned errors were in reality of no [7] substantial consequence. If the appeal is from an order refusing a new trial, urging errors of law occurring at the trial, the appellant will propose for his transcript not only the judgment-roll and his settled bill of exceptions, if there be one, but also any other proceedings including such parts of the stenographic record as he thinks proper or necessary, and his adversary must propose and have incorporated in the transcript such additional matters as he thinks necessary to show that the [8] supposed errors were cured, corrected or inconsequential. If the appeal seeks to present the insufficiency of the evidence, it will, of course, be necessary to incorporate all the evidence in [9] the transcript on appeal. If on any appeal a question arises touching the accuracy of any paper or document set out in the transcript, the original, if not a part of the judgment-roll, may be brought up by either party or, if a part of the judgment-roll, by the supreme court; and when there is a doubt in the mind of the court as to whether the transcript is accurate or ample, or whether any error was substantial or has been compensated, the court may resort to the stenographic record, if brought up, to set that doubt at rest.

In the present instance the appellant assigns errors which do not appear upon the face of the judgment-roll, and seeks to have them reviewed on his appeal from the order denying him a new trial. It is manifest from what is said in the original opinion that he is in no position to do this as his transcript is now constructed; nor can he, by any effort, bring the supposed refusal of instruction No. 14 before us. Neither in the tran-

script on appeal nor in the stenographic record is it made to appear that the instruction was ever offered, or, if it was offered, what the ground of objection was or why it was refused—in brief, the paper is in no way identified as a part of the proceedings in the case. Counsel argues that subdivision 5 of [10] section 6746, Revised Codes, has been modified by Chapter 135, Laws of 1915, and therefore he was not required to identify or authenticate the proposed instruction. Not only does Chapter 135, Laws of 1915, contain no such modification, but it expressly forbids against any such contention.

The other questions sought to be presented here could be considered if the appellant should do what he notified the respondent he would do, *viz.*, incorporate in his transcript on appeal the stenographer's record, and cause to be certified to this court the original exhibits in the case; and this he must do at his own cost if he would be further heard. Ordered accordingly.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE HOLLOWAY dissents.

CASES DETERMINED
IN THE
SUPREME COURT
AT THE
OCTOBER TERM, 1917.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. SYDNEY SANNER,
THE HON. WILLIAM L. HOLLOWAY, } **Associate Justices.**

MURRAY, APPELLANT, v. HALDORN, RESPONDENT.

(No. 3,797.)

(Submitted October 3, 1917. Decided October 8, 1917.)

[168 Pac. 38.]

Counterclaims—Unjustifiable Verdict.

1. Where, in an action on a promissory note, the total of defendant's counterclaims could not be made to equal the amount admittedly due plaintiff, a verdict in favor of the former was unjustifiable.

Appeal from District Court of Silver Bow County; Michael Donlan, Judge.

ACTION by James A. Murray against George Haldorn. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Mr. James E. Healy and ***Mr. James E. Murray***, for Appellant, submitted a brief. ***Mr. Healy*** argued the cause orally.

No appearance in behalf of Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The complaint in this instance is the usual form employed in an action to recover upon a promissory note. The answer admits the execution and delivery of the note and attempts to set up forty-five separate counterclaims, for amounts aggregating \$18,432.50. Of this amount \$112.50 was claimed for moneys paid out by the defendant for the plaintiff as court costs and other necessary expenses. Upon the trial two of the alleged counterclaims, each for \$1,000, were excluded from the jury's consideration. A verdict was returned in favor of defendant for \$4,021.18, and from the judgment entered thereon this appeal is prosecuted.

It is necessary to consider but one of the contentions made [1] by appellant. Upon no possible theory of the case can the verdict be justified or the judgment sustained. The execution and delivery of the note being admitted, the court instructed the jury that at the date of the trial there was due plaintiff under the terms of the note a balance of \$22,787.33. The court also ruled, and instructed the jury, that defendant was entitled to interest upon the several sums paid out by him for costs and expenses, but was not entitled to interest upon the other items embraced in the remaining counterclaims.

If the full amount of every counterclaim be admitted, and interest computed upon the several sums paid out for costs and expenses and added thereto, the total of defendant's claims cannot equal \$19,000—more than \$3,000 less than plaintiff's admitted claim. Excluding the amounts in the two counterclaims withdrawn from the jury, and deducting from the balance the \$2,000 admitted by plaintiff and credited upon the note, the utmost that defendant can maintain as an offset to the admitted claim of plaintiff, is less than \$15,000. Viewed in any possible light, plaintiff was entitled to a judgment for some amount, and under ordinary circumstances we should determine the amount, and direct that judgment be entered accordingly; but appellant concludes his brief as follows: "Upon the con-

ceded facts a judgment should have been recovered against defendant, but for the purpose of this appeal, and in order to do away with this vexatious litigation, plaintiff now waives any right to judgment herein, and prays that the action be reversed and dismissed." In conformity with this concession, it is ordered that the judgment herein be reversed and the cause remanded to the district court, with directions to render and enter judgment on the merits dismissing the action.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

RICHLI ET AL., APPELLANTS, v. MISSOULA TRUST &
SAVINGS BANK ET AL., RESPONDENTS.

(No. 3,814.)

(Submitted October 8, 1917. Decided October 13, 1917.)

[168 Pac. 41.]

*Water Rights—Appeal and Error—Right of Appeal—Estoppel
—Acquiescence in Decree.*

Right of Appeal—Estoppel.

1. Where a party has recourse to a judgment as an active instrument for his benefit, he may not thereafter prosecute an appeal from it.

Water Rights—Right of Appeal—Estoppel by Acquiescence in Decree.

2. *Held*, under the above rule, that plaintiffs in a water right suit estopped themselves from prosecuting an appeal from the decree in the provisions of which they acquiesced during the entire irrigating season following its entry by consenting to the appointment of a water commissioner to apportion the water of the stream in controversy as decreed, by contributing to the payment of his compensation, by prosecuting such officer for contempt, as well as by soliciting the appointment of a new commissioner for the second season following rendition of the decree.

[As to equitable estoppel as defense to suits to restrain diversion and use of water, see note in *Ann. Cas.* 1914B, 996.]

Appeal from District Court, Missoula County; John E. Patterson, Judge.

Surr by John Richli and others against the Missoula Trust & Savings Bank and others. From the decree, plaintiffs John Richli and Harry Taylor appeal. Appeal dismissed.

Mr. Harry H. Parsons, for Appellants C. E. Quast, Earl D. White and I. E. Andrus, submitted a brief; *Mr. Elmer E. Hershey*, for Appellants John Richli, Harry Taylor, Missoula Trust and Savings Bank and the W. H. Smead Company, argued the cause orally. A joint reply brief to Respondent's motion to dismiss was filed by above counsel in behalf of Appellants and John C. Lehsou, Respondent.

Mr. Frank A. Roberts and *Mr. E. C. Mulroney*, for Mary F. England, Ella M. Anderson, Catherine Flynn, Executrix, and Ellen Flynn, Respondents, submitted a brief, as well as one in support of motion to dismiss appeal. *Mr. Roberts* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Suit to settle and determine the rights of the respective parties to the waters of Grant Creek in Missoula county. Decree was entered on December 19, 1914. Within a year thereafter the appellants filed their notices of appeal, and since that time have filed a bond and transcript for the purpose of perfecting a joint appeal from such decree. Respondents have moved to dismiss the appeal upon several grounds, among them this: "That the * * * appellants * * * each and all acquiesced in, ratified and recognized the validity of the decree, * * * acted under said judgment and decree, claimed and accepted the fruits and benefits thereof, and enforced their rights thereunder, and that they are now estopped from denying the validity of said judgment or of appealing therefrom, as will appear from the records, papers and files in this action, * * * certified copies of which * * * are attached hereto."

The record shows that the decree in question, together with the findings of fact and conclusions of law on which the decree is based, were prepared and submitted to the trial court by the

counsel for the plaintiffs Richli and Taylor, who are appellants in this court; that although notice of such findings, conclusions, and decree was given to counsel for all the defendants within five days after the making and entering of the same, no protest, objection or exception was ever made or taken to the same, save as hereinafter stated; that on April 7, 1915, a meeting was held for the purpose of selecting a board to manage and control the use of the waters of Grant Creek under said judgment and decree, which meeting was attended by fifteen or more of the parties to this action, including the appellants Richli, Taylor, Andrus, Margaret Johnson and the Smead Company, whereat the appellants Richli and Quast, as well as the representative of the Smead Company and two others, were chosen for such board, and whereat it was voted to request the court to appoint Dan J. Courtney as water commissioner to distribute the waters under said decree; that Richli did not act as a member of such board, nor take any part in procuring the appointment of a commissioner; that on April 13, 1915, Courtney was appointed as such commissioner, and he proceeded to and did distribute water under said decree to the parties to this action, including all the appellants; that on April 29, 1915, certain of the parties, including the appellants Andrus, Margaret Johnson, and the Smead Company, filed in the district court a petition, asking that the water commissioner be cited to appear and show cause why he should not be removed as well as punished for contempt for failing to carry out the terms of the decree—in support of which petition the appellant Andrus and J. N. Huckaba (representing the appellant Smead Company) filed affidavits, complaining that the commissioner had refused to furnish certain of the parties, including the affiants and the appellant Margaret Johnson, with the water to which they are entitled under the decree, notwithstanding their demand therefor; that he is in contempt of court for refusing and neglecting to carry out the terms of the decree; that he does not understand measuring water, and “is therefore unable to give to the various parties the quantity of water to which they are entitled under the decree”; that the

proceeding just referred to was dismissed by stipulation without prejudice on May 8, and two days later the appellant Andrus filed a formal complaint, praying the removal of the water commissioner and his punishment for contempt, in which complaint he expressly grounds the rights of himself and of the appellants Margaret Johnson and the Smead Company upon the decree, alleges failure and refusal of the commissioner to carry out the terms of the decree, avers that his distribution of the water was "not in accordance with the decree," that he has acted without regard to the decree, giving too little to some and too much to others, and is unable, because he does not understand the measurement of water, to administer the decree; that in this complaint appellant Andrus was, on May 12, 1915, formally joined by the appellants Taylor, Margaret Johnson, Quast and eight other parties to the action, and the hearing had the same day resulted in an order retaining the commissioner and continuing the proceeding; that on May 25, all the appellants confessed knowledge of the findings, conclusions, and decree by filing either notices of intention to move for new trial or formal exceptions to such findings and conclusions, but the notices of intention were fatally defective, and the exceptions were never presented to or brought to the attention of the court; that on August 7 the hearing upon the complaint to remove the commissioner and punish him for contempt was resumed, and at such hearing the appellant Richli testified in favor of retaining the services of a commissioner to administer said decree until September 1 at least, and the final order of the court was in accordance with that view; that during the months of April, June, July and August, 1915, the commissioner distributed water as under said decree to the parties thereto, including all the appellants, who each and all and at divers and sundry times demanded and received such water as under and pursuant to said decree, and each paid from month to month their respective and proportionate shares of his salary fixed for such service; that the headgates and weirs for the measurement of the water so distributed were placed at the heads of each of the respective

ditches of all the parties to this action, by such parties; that on March 20, 1916, all the appellants joined with nine others of the parties to this action in a petition to the district court, which recites that they are persons "to whom were given water by that certain decree made by the court in the above-entitled action," and requests "the appointment of L. M. Coleman as water commissioner (from May 1 to August 1, 1916), who shall have authority to administer and distribute to the parties bound by said decree the water to which they are entitled according to their rights as fixed by such decree."

In the domain of the law, as elsewhere, "One cannot eat his [1, 2] cake and have it too." The appellants, at almost every opportunity and in almost every way open to them, signified their acceptance of or acquiescence in the decree from which they now seek to prosecute an appeal. They did more than merely take and use the waters of Grant Creek; they each invoked the decree, claiming not only the right to use the water, but claiming such rights as under, defined by, and awarded to them in, the decree. The water commissioner, appointed at the solicitation of some of them, prosecuted for contempt by others of them, and paid for dispensing water by all of them, could only have been appointed, punished or paid in virtue and consequence of the decree. Even after they had filed their notices of appeal from the decree, the appellants stood upon it in the district court asserting rights under it, soliciting the appointment of a commissioner of their choice with authority to administer the decree during the irrigating season of 1916 and to distribute water to them as to parties who are bound and whose rights have been determined by the decree. Thus the decree was and is an active instrument in the hands of the appellants for their benefit, and they cannot now be permitted to prosecute an appeal from it to this court. (*Estate of Shaver*, 131 Cal. 219, 63 Pac. 340; *Storke v. Storke*, 132 Cal. 349, 64 Pac. 578; *Turner v. Markham*, 152 Cal. 246, 92 Pac. 485; *McKain v. Mullen*, 65 W. Va. 558, 29 L. R. A. (n. s.) 1, and note, pp. 1-7,

64 S. E. 829; *Elwert v. Marley*, 53 Or. 591, 133 Am. St. Rep. 850, 99 Pac. 887, 101 Pac. 671.)

Respondents' motion is granted and the appeal is dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

MINNEAPOLIS STEEL & MACHINERY CO., APPELLANT, v.
THOMAS ET AL., RESPONDENTS.

(No. 3,806.)

(Submitted October 6, 1917. Decided October 15, 1917.)

[168 Pac. 40.]

Corporations—Annual Reports—Filing—Liability of Directors
—County Clerks—Filing Fees—Statutes—Appeal and Error
—Scope of Review.

Appeal and Error—Scope of Review.

1. If the conclusion of the trial court was correct, it is immaterial what reason was assigned for it.

County Clerks—"Filing" Instruments—Fees—Prepayment.

2. Where a paper entitled to be filed is deposited with the proper custodian and, if prepayment of the filing fee is required, the fee tendered, it is filed, the marking thereof as "Filed" not constituting the filing.

Same—Fees—Prepayment—Statutes.

3. Under section 3043, Revised Codes, the county clerk may, but is not required to, demand prepayment of filing or other fees; section 3144, having to do with the payment of fees in advance, being inapplicable.

Same—Filing Fees—What Does not Constitute a Demand.

4. Where a corporation sent its annual report to the county clerk with the request that he advise it as to his fee for filing, his answer (accompanying his refusal to file it because not acknowledged), "Will state that the fee for filing is \$1," held not such a demand for prepayment of the fee as is contemplated by section 3043, Revised Codes.

Same—Corporations—Annual Reports—Failure to File—Evidence—Insufficiency.

5. A corporation mailed its annual report to the county clerk on January 16 but failed to inclose the filing fee of one dollar. The clerk received the report on the 17th or 19th, retained it in his office and mailed the sender a bill for the fee. On January 23 the fee was received and the clerk thereupon indorsed the report as filed on the latter date. The statute (Rev. Codes, sec. 3850, as amended by Laws of 1909,

Chap. 140) provides that the report must be filed within twenty days from and after December 31. In an action commenced to enforce the directors' individual liability for failure to file the report in time, evidence held insufficient to show that the report was not filed in time.

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

ACTION by the Minneapolis Steel & Machinery Company against A. L. Thomas and others. Judgment for defendants and plaintiff appeals from it and an order denying him a new trial. Affirmed.

Messrs. Grimstad & Brown, for Appellant, submitted a brief; *Mr. O. K. Grimstad* argued the cause orally.

Messrs. Nichols & Wilson, for Respondents, submitted a brief; *Mr. Edmund Nichols* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

During 1913 the Alfalfa Products Company, a Montana corporation, became indebted to the Minneapolis Steel & Machinery Company, and the indebtedness has not been discharged. On January 9, 1914, the officers and directors of the Montana company, through their agent, the Columbus State Bank, transmitted to the county clerk of Yellowstone county the annual report required by section 3850, Revised Codes, as amended by the Laws of 1909, page 217, and accompanying the report was this letter:

"Mr. F. E. Williams, Co. Clerk, Billings—

"Dear Sir: We inclose herewith annual report of the Alfalfa Products Company for filing. Kindly advise us of your fees in the matter and we will remit.

"Yours very truly,

"L. DOAN DIXON,

"Vice-President."

On January 12 the clerk returned the report, with an explanatory letter as follows:

“Jan’y 12, 1914.

“Columbus State Bank, Columbus, Mont.—

“Gentlemen: I am in receipt of your favor of the 9th inst., inclosing annual statement of the Alfalfa Products Company, which I am returning herewith to you for the reason that the same has not been acknowledged according to law. Will also state that the fee for filing annual statement is \$1.00.”

On January 16 the report was again sent to the clerk, with the following letter:

“F. E. Williams, Co. Clerk, Billings, Mont.—

“Dear Sir: I return herewith the annual statement of the Alfalfa Products Company properly acknowledged, together with cashier’s check for the sum of \$1.00, being your fee for recording.

“Very truly yours,

“L. DOAN DIXON,

“Vice-President.”

Through inadvertence, or for some other reason not explained, the bank failed to inclose the check. The clerk received the report on January 17 or 19 and retained it thereafter in his office. He immediately mailed to the bank a bill or statement, made out upon an ordinary billhead in use in the office. On January 23 the \$1 was received, and the clerk thereupon indorsed his filing mark upon the report. In March following, this action was commenced against the directors of the Alfalfa Products Company to enforce their individual liability for the company’s debts, upon the theory that the report was not filed on or before January 20 as required by statute. The trial court found for defendants, and plaintiff appealed.

If the conclusion reached by the trial court was correct, it is [1] immaterial what, if any, reason was assigned for it. (*City of Butte v. Goodwin*, 47 Mont. 155, Ann. Cas. 1914C, 1012, 134 Pac. 670.) In *Dewar’s Estate*, 10 Mont. 426, 25 Pac. 1026, this court announced the general rule, accepted by practically all courts, as follows: “To file papers is to deposit them with the [2] proper custodian for keeping. The marking of them

'Filed' by the clerk is another matter, and is not the filing." Of course, this rule presupposes that the paper is one entitled to be filed, and that the filing fee, if any, is tendered, if prepayment is required to secure filing.

Section 3043, Revised Codes, found in a chapter which deals exclusively with the powers and duties of the county clerk, provides: "He is not bound to record any instrument, or file any paper or notice, or furnish any copies, or to render any service connected with his office, until the fee for the same, as prescribed by law, is, *if demanded*, paid or tendered."

Counsel do not refer to section 3144, Revised Codes. They [3] assume that the provisions of section 3043 are controlling, and under the rule adopted by the Codes for their own interpretation (sec. 3556, Rev. Codes), we think they are correct in their assumption. Under this section the clerk is authorized, but not required, to demand the prepayment of fees. He is liable on his official bond for all fees due to his office; but he may collect them after services are rendered, if he chooses to do so.

The only evidence produced upon the trial was offered by the plaintiff. The appellant lays stress upon the following testimony given by the clerk: "I returned the instrument the first time because it had not been sworn and acknowledged before a notary public, and for the reason that it was not accompanied by the fee." However, an undisclosed purpose could not affect the rights of the defendants. The only reason submitted to the bank, or to anyone else, for the return of the paper, is found in the clerk's letter above. The letters disclose fully just what was done. The reason assigned by the clerk in his letter was not valid. Aside from the fact that he is a ministerial officer, section 3850, as amended, does not seem to require that the report shall be acknowledged in any event, or that it shall be verified, unless, possibly, when, in the absence or inability of the president of the corporation to act, the vice-president signs the report in his stead.

If the bank had inclosed the filing fee with the report in its letter of January 9, it is perfectly clear that in contemplation

of law the report would have been filed upon its receipt by the clerk, which was not later than January 12, even though the clerk refused to make the proper indorsement and returned it to the [4] bank. It is equally clear, from the decision in the *Dewar Case* and from the provisions of section 3043, that it was so filed, unless the clerk demanded that the filing fee be paid in advance. If he made any demand, it is to be found in this language contained in his letter: "Will also state that the fee for filing annual statement is \$1." It is not material to inquire concerning the meaning of the term "demand" in the abstract. Section 3043 contemplates, not merely a demand for the fee, but a demand that the fee be paid in advance, as a condition precedent to the rendition of official service. When the quotation above is read in connection with the bank's letter of January 9, it is made reasonably certain that the clerk intended nothing more than to answer the inquiry made by the bank and furnish the desired information. The letter cannot be construed as containing such a demand as is contemplated by section 3043 above.

The bill or statement sent to the bank by the clerk on January [5] 17 or 19 was not offered in evidence, no demand was made upon the bank to produce it, no attempt was made to prove its contents, and the blank form employed by the clerk was not offered, so far as the record discloses. It is impossible to say just what significance might attach to this bill or statement, if in evidence.

The burden of proof was upon the plaintiff, and in its attempt to show that the report was not filed on or before January 20 we think it failed. The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

LEGGAT ET AL., APPELLANTS, v. CITY OF BUTTE,
RESPONDENT.

(No. 3,796.)

(Submitted October 3, 1917. Decided October 15, 1917.)

[168 Pac. 38.]

Cities and Towns—Special Improvement Districts—Recovery of Assessments Paid—Limitations—Presentation of Demand—Appeal and Error—Correct Ruling—Wrong Reason—Effect.

Appeal and Error—Correct Ruling—Wrong Reason—Effect.

1. Where the ruling of the trial court on a motion for judgment on the pleadings was correct, its reason for making it is of no consequence.

Special Improvements—Recovery of Assessments Paid—Limitations.

2. If money paid under protest upon a special improvement assessment is a "tax, license or other demand for public revenue" within the meaning of Chapter 135, Laws of 1909, section 1, suit to recover same is barred sixty days after November 30 of the year in which the tax was paid.

Same—Presentation of Demand.

3. If money paid as above is not a "tax, license or other demand for revenue" (Chap. 135, Laws 1909, sec. 1), it forms the basis of a mere demand against the city, not suable until after presentation to and disallowance by the city council.

Same—Defective Materials—Injunction—Limitations.

4. Assuming (but not deciding) that a special improvement assessment may be enjoined or annulled because of the act of the city council in permitting the use of material not up to specifications, attack based on such ground must be made within thirty days after passage of resolution levying the assessment.

Appeal from District Court, Silver Bow County; J. B. McCleran, Judge.

ACTION by Alexander Leggat and another against the city of Butte. From a judgment of dismissal, plaintiffs appeal. Affirmed.

Cause submitted on briefs of Counsel.

Mr. A. C. McDaniel, for Appellants.

The position of the plaintiffs is that a special assessment for improvements is not a tax, license or any other demand for public revenue, and that the action is not barred by section 2742,

as amended, or section 2743, as amended, because not embraced within the sections. "Taxes" are defined to be burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes. (*Citizens' Sav. & Loan Assn. v. Topeka*, 87 U. S. 655, 22 L. Ed. 455; *Dranga v. Rowe*, 127 Cal. 506, 59 Pac. 944; *Houghton v. Austin*, 47 Cal. 646.) Taxes are impositions for purposes of general revenue, while assessments are special and local impositions upon property in the immediate vicinity of an improvement, for the public welfare, which are necessary to pay for the improvement and made with reference to the special benefit which such property derives from the expenditure. (*Winona & St. P. R. Co. v. Watertown*, 1 S. D. 46, 44 N. W. 1072; *Holley v. Orange County*, 106 Cal. 420, 39 Pac. 790; *Kalispell v. School District*, 45 Mont. 221, Ann. Cas. 1913D, 1101, 122 Pac. 742.)

The word "tax" or "taxes" does not include local assessments, unless there be something in the statute in which it is found to indicate such an intention. (*Ittner v. Robinson*, 35 Neb. 133, 52 N. W. 846; *Denver v. Knowles*, 17 Colo. 204, 17 L. R. A. 135, 30 Pac. 1041; *Kilgus v. Trustees of the Church Home*, 94 Ky. 439, 22 S. W. 750; *Pettibone v. Smith*, 150 Pa. St. 118, 17 L. R. A. 423, 24 Atl. 693; *Emery v. San Francisco Gas Co.*, 28 Cal. 345; *Taylor v. Palmer*, 31 Cal. 240; *People v. Mayor etc.*, 4 N. Y. (Comst.) 420, 55 Am. Dec. 266; *Bolling v. Stokes*, 2 Leigh (Va.), 178, 21 Am. Dec. 606; *Gould v. Mayor etc. of City of Baltimore*, 59 Md. 378.)

Mr. J. V. Dwyer, Mr. John A. Groeneveld and Mr. N. A. Roterling, for Respondent.

MR. JUSTICE SANNER delivered the opinion of the court.

The plaintiffs are the owners of certain property in the city of Butte, which property is included within special improvement district No. 108, created on April 27, 1910. On May 18 an ordinance was passed for paving said district, plans and specifications were prepared by the city engineer, and on July 20

the contract was let. In September the contractor commenced work furnishing material, including brick, to be used in the paving; but plaintiffs protested to the city engineer against the use of the brick so furnished, for the reason that the same did not substantially conform to the plans and specifications. The city engineer had, prior to the protest of plaintiffs, condemned the brick, but the defendant had overruled the city engineer and allowed the contractor to use the brick, he giving a bond and contract that the street would remain in good condition for ten years, and that he would make all repairs at his own expense. The paving was completed under the contracts, and the defendant thereafter gave notice of its intention to pass a resolution levying a special assessment to defray the cost of the improvement. On April 26, 1911, the plaintiffs appeared before the city council and protested against the adoption of such resolution, but their protest was overruled, and on June 14, 1911, the resolution (No. 913) was passed. The plaintiffs' property was thereupon assessed in the sum of \$174.16, payable in eight annual installments of \$21.77 each, and, the first installment not being paid at the time fixed, the property was sold to the city. On November 26, 1912, the plaintiffs under protest paid the defendant the sum of \$211.68, which was the whole amount of the assessment with penalty, costs and interest, and on November 26, 1913, they brought this action to have the resolution (No. 913) and the assessment declared invalid, and to recover the sum of \$211.68 so paid thereunder, with interest.

To the complaint setting forth the above facts the defendant demurred generally, and, its demurrer having been overruled, answered with the pleas that plaintiffs' alleged cause of action is barred by section 1 of Chapter 135, Session Laws of 1909, by section 2742, Revised Codes, as amended by section 1, Chapter 135, Session Laws of 1909, by section 2, Chapter 135, Session Laws of 1909, and by section 2743, Revised Codes, as amended by section 2, Chapter 135, Session Laws of 1909. The plaintiffs demurred to these pleas as insufficient and, their demurrer being overruled, declined to plead further. Thereupon the defendant moved for judgment on the pleadings for want of a

reply to the answer and because the complaint does not state a cause of action, which motion was granted and judgment of dismissal was entered. Hence this appeal.

The plaintiffs' contention is that error was committed in overruling their demurrer to the defendant's pleas of limitation, and in granting the defendant's motion for judgment, because the statutory provisions invoked have no application to the subject matter, the special assessment paid under protest not being a "tax, license or other demand for public revenue."

Presumably, the motion was granted for want of a reply; but [1] the reason for the ruling is not of vital consequence, if the ruling itself was correct. And we think it was correct. The moneys paid under protest were or they were not for a "tax, [2, 3] license or other demand for public revenue." If they were, suit to recover was barred sixty days after November 30, 1912, or on January 29, 1913. (Chapter 135, Laws 1909, sec. 1.) If they were not, then such payment—if it could form the basis of an action at all—would stand as a mere demand against the city, not suable until after presentation to and disallowance by the city council (Rev. Codes, sec. 3288; *Dawes v. City of Great Falls*, 31 Mont. 9, 77 Pac. 309), which presentation and disallowance must appear upon the face of the complaint.

For other reasons, however, it is doubtful if the plaintiffs could [4] maintain this action. Assuming, but not deciding, that the act of the city council in permitting the use of brick which were not up to specifications might have availed to enjoin or annul the assessment, no such attack could be made later than July 14, 1911, or thirty days after resolution No. 913 was passed. (Rev. Codes, sec. 3422; *Franklin v. Franklin*, 40 Mont. 348, 20 Ann. Cas. 339, 26 L. R. A. (n. s.) 490, 106 Pac. 353; *Dolenty v. Broadwater County*, 45 Mont. 261, 122 Pac. 919; *Cullen v. Western M. & W. T. Co.*, 47 Mont. 513, 134 Pac. 302.)

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

DOVER LUMBER CO., RESPONDENT, v. WHITCOMB ET AL.,
APPELLANTS.

(No. 3,816.)

(Submitted October 8, 1917. Decided October 23, 1917.)

[168 Pac. 947.]

Claim and Delivery—Statute of Frauds—Sales—Constructive Delivery—Logs and Logging—Passing of Title—Appeal and Error—Presumptions—Foreign Corporations—“Doing Business.”

Sales—Statute of Frauds—Change of Possession.

1. The statute of frauds (Rev. Codes, sec. 6128) requiring the surrender of control by the vendor and assumption of possession by the vendee of personal property which is the subject of a sale is satisfied whenever there has been such actual change of dominion over the thing sold as is practically consistent with its nature, extent and intended use, viewed in the light of the character of the transaction and the situation of the parties at the time.

[As to symbolical or constructive delivery of goods within statute of frauds, see note in *Ann. Cas.* 1917B, 566.]

Same—Delivery—Evidence of Change of Possession.

2. The delivery of a thing sold may be symbolical as well as actual, and the identification of the property in the hands of the new owner, by the means usually employed for such purpose, is generally sufficient evidence of a change of possession.

Appeal and Error—Presumptions—Duty of Appellant.

3. In entering upon the consideration of an appeal, the supreme court indulges the presumption that the conclusion reached by the trial court is justified, the burden of showing that under no view of the facts disclosed will they support the judgment appealed from being on appellant.

Logs and Logging—Constructive Delivery—Passing of Title.

4. In an action in claim and delivery by the purchaser of sawlogs against an attaching creditor of the seller of the logs, where the contract of sale provided, among other things, that the logs should be bark-marked as well as end-marked with the purchaser's mark, and thereafter scaled by its agent, part payment to be made for logs at a certain creek landing, "balance to be paid when logs are delivered in

On effect of contract with respect to standing timber to pass title to the same, see notes in 6 *L. R. A.* (n. s.) 469; 47 *L. R. A.* (n. s.) 870.

On validity of contract made by foreign corporations which have not complied with statutory conditions of the right to do business in the state, see note in 24 *L. R. A.* 315.

As to when a foreign corporation which has entered into a contract for the local handling of its product will be considered as doing business within the state, within the meaning of a statute prescribing the conditions upon which foreign corporations may transact business therein, see note in *L. R. A.* 1916F, 334.

the Clark's Fork River," provided that "if logs are not delivered in 1913, \$1.00 per M. shall be deducted from contract price," *held* that title to the logs passed to the buyer when it and the seller intended that it should pass, to-wit, when the logs were marked, scaled and removed to the creek landing, and not when they were delivered in the Clark's Fork River, payment of the last installment of the purchase price not being essential to the passing of title.

Sales—Passing of Title—Rule.

5. The rule that title to personal property does not pass to the buyer if anything remains to be done by the seller refers to something necessary to determine the quantity, quality or identity of the thing sold, or to something necessary to put the article in the condition contemplated by the contract of sale.

Foreign Corporations—"Doing Business"—Definition.

6. Making a single contract or purchase does not constitute "doing business," within the meaning of sections 4413 and 4415, Revised Codes, which provide that contracts made by foreign corporations without having first, before doing business within this state, filed its articles of incorporation, *etc.*, in certain offices, shall be unenforceable.

MR. CHIEF JUSTICE BRANTLY Dissenting.

Appeal from District Court, Sanders County; Theo Lentz, Judge.

ACTION by the Dover Lumber Company against John W. Whitcomb and others. Judgment for plaintiff and Whitcomb Bros., appeal. Affirmed.

Cause submitted on briefs of Counsel.

Mr. Frank A. Roberts, for Appellants.

Plaintiff, to be entitled to judgment, must establish by a preponderance of the evidence: 1. That at the time the suit was instituted, it was the absolute owner (for no qualified ownership by lien or otherwise is claimed in the complaint) and lawfully entitled to the immediate and exclusive possession of the property in controversy in this suit. 2. That the property was wrongfully detained by the defendants. The facts as admitted fall far short of showing the absolute ownership of the logs to have been in the plaintiff at the time this action was instituted. At best they simply show that plaintiff had an executory contract to purchase them (see 35 Cyc. 274-276, 282), and had paid a portion of the purchase price to the owner of the logs; that the logs, as was clearly contemplated by the plain provisions.

of the contract, remained at all times in the possession of the owner, and he was to deliver them into the Clark's Fork River, and after such delivery would thereupon be entitled to the balance due on the contract price.

Plaintiff in claim and delivery has the burden of establishing every material fact. (*Finch v. Kent*, 24 Mont. 268, 272, 61 Pac. 653; *Gallick v. Bordeaux*, 31 Mont. 328, 337, 78 Pac. 583; *Cameron v. Wentworth*, 23 Mont. 70, 78, 57 Pac. 648; *Hickey v. Breen*, 40 Mont. 368, 20 Ann. Cas. 429, 106 Pac. 881.) This evidence establishes nothing more than: (1) An executory agreement to sell and deliver logs into the Clark's Fork River. (2) Payment by the lumber company on account of such agreement. That is, the evidence does not in any way unequivocally establish a sale consummated by the delivery of the logs to the lumber company; much less does it show the continued change of possession required by the statute. (*Evans v. Harris*, 19 Barb. (N. Y.) 416.)

Title to property covered by an executory agreement does not pass at the execution thereof, and the property covered thereby remains the property of the seller until the contract is executed. (35 Cyc. 274; *Adlam v. McKnight*, 32 Mont. 349, 353, 80 Pac. 613; *Hallidie v. Sutter St. R. Co.*, 63 Cal. 575; *Fleming v. State*, 106 Ga. 359, 32 S. E. 338; *Buskirk Bros. v. Peck*, 57 W. Va. 360, 50 S. E. 432; *Hatch v. Standard Oil Co.*, 100 U. S. 124, 25 L. Ed. 554; *Halterline v. Rice*, 62 Barb. (N. Y.) 593; *O'Keefe v. Kellogg*, 15 Ill. 347; *Gross v. Ajello*, 132 App. Div. 25, 116 N. Y. Supp. 380.)

As between the parties to a contract for the sale of personal property, the question as to when title passes is one of intention of the parties as shown by their agreement, and if the intention is manifested clearly and unequivocally in the contract itself, it controls; but there is a presumption at law that if something remains to be done for the purpose of testing the property or of fixing the amount to be paid, or of putting the property into condition for final delivery, or if final delivery has not been made to the purchaser, the title to the prop-

erty does not pass or vest in the purchaser until the act in question is done. In the contract between Derr and the plaintiff there is no manifest intention that the title in the logs should pass before delivery was made in the Clark's Fork River. (*Andrews v. Durant*, 11 N. Y. 35, 62 Am. Dec. 55; *Edwards v. Elliott*, 36 N. J. L. 449, 13 Am. Rep. 463; *West Jersey R. Co. v. Trenton Car Works Co.*, 32 N. J. L. 517; *Mucklow v. Mangles*, 1 Taunt. 318, 9 Rev. Rep. 784, 127 Eng. Reprint, 856; *In re Alaska Fishing & Dev. Co.*, 167 Fed. 875; *Rothwell v. Luken*, 60 Ill. App. 150.)

The foregoing rule, applicable to the parties to the contract, however, has no application to third party creditors, and good faith in the transaction as between the parties and the payment or nonpayment of the purchase price does not in any way take the case out of the statute. (*Taylor v. Malta Merc. Co.*, 47 Mont. 342, 346, 132 Pac. 549; *Morris v. McLaughlin*, 25 Mont. 151, 64 Pac. 219; *Vance v. Boynton*, 8 Cal. 554; *Woods v. Bugbey*, 29 Cal. 466; *Felt v. Cleghorn*, 2 Colo. App. 4, 29 Pac. 813; *Burchinell v. Weinberger*, 4 Colo. App. 6, 34 Pac. 911; *Helgert v. Stewart*, 20 Colo. App. 202, 77 Pac. 1091.) "A sale of personal chattels, unaccompanied by possession, is fraudulent in law as to creditors of the vendor. This is a question for the court, and not for the jury." (*Dewart v. Clement*, 48 Pa. St. 413.) The change of possession must be such as will give evidence to the world of the claim of the new owners. (*McKee Stair Building Co. v. Martin*, 126 Cal. 557, 58 Pac. 1044.)

Mr. Harry H. Parsons and *Mr. A. S. Ainsworth*, for Respondent.

There is nothing that reflects upon the good faith of the parties to the sale; therefore the question of fraud may be eliminated. (*Morris v. McLaughlin*, 25 Mont. 151, 64 Pac. 219; *Taylor v. Malta Merc. Co.*, 47 Mont. 342, 132 Pac. 549.) The questions of law to be determined under section 6128 of the statute in this case are these: (1) Was there an immediate delivery of the logs made by Derr to the plaintiff? and (2) If

there was such a delivery, was it followed by an actual and continued change of possession? In this state, and by the great weight of authority, a symbolical delivery is equivalent to an actual delivery. (*Western Supply Co. v. Quinn*, 40 Mont. 156, 135 Am. St. Rep. 612, 20 Ann. Cas. 173, 28 L. R. A. (n. s.) 214, 105 Pac. 732; *Taylor v. Malta Merc. Co.*, 47 Mont. 342, 132 Pac. 549.)

The first question that presents itself is: Was there a delivery of the logs to the plaintiff, actual or constructive? The rule for determining what constitutes a delivery is laid down in *Dodge v. Jones*, 7 Mont. 121, 14 Pac. 707, and *Cady v. Zimmerman*, 20 Mont. 225, 50 Pac. 553. In the case of *Barker v. Livingston County Nat. Bank*, 30 Ill. App. 591, it is held that the posting of notices on cribs of corn is a sufficient delivery as against creditors of the vendor. (*Hawkins v. Kansas City Hydraulic Press Brick Co.*, 63 Mo. App. 64.) *Jewett v. Warren*, 12 Mass. 300, 7 Am. Dec. 74, a case similar to the one at bar, was disposed of in favor of the vendee.

Another interesting case along the same line is that of *McElwee v. Metropolitan Lumber Co.*, 69 Fed. 302, 16 C. C. A. 232. In *Dubois v. Spinks*, 114 Cal. 289, 46 Pac. 95, it was held that a quantity of cordwood had passed into the possession of the transferee, although the wood had not been moved from the place where it had been piled. (See, also, *Williamson v. Richardson*, 205 Fed. 245, 123 C. C. A. 427; *Northern Merc. Co. v. Schultz*, 56 Wash. 393, 104 Pac. 850; *Hagins v. Combs*, 102 Ky. 165, 43 S. W. 222.)

Coming now to the second phase of the case, and that is whether or not if there was a delivery it was followed by actual and continued change of possession, if there was a delivery in law, it follows as a matter of course that there was a change of possession. The logs were delivered at Blue Creek as they were cut; the marking of them with the end-mark "F" and the scaler, being the last one in possession, indicated the acceptance of them. This, of course, in law, constituted a change of possession. The change of possession was immediate upon

the marking of the logs, and it was continued since the inception of that possession was never altered or changed after the delivery or acceptance by the plaintiff in this case. (*Dodge v. Jones*, above.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In October, 1912, John Derr contracted to sell to the Dover Lumber Company not less than 400,000 feet of sawlogs to be cut from standing timber then owned by him. The logs were to be measured or scaled by a scaler to be employed by the company, but who was to be boarded at Derr's expense. The contract specifies the several lengths into which the logs were to be cut, the percentage of white and yellow pine, respectively, the quality of logs, and the price. The following portions of the contract are material here:

"Time of payment and manner of doing so as follows: \$3.00 per M feet on skids \$4.00 per M in Blue Creek; balance to be paid when logs are driven and delivered in the Clark's Fork River; logs scaled during the month to be paid on the 15th day of the month following scaling and delivering; balance or —pct. to be held back by the party of the second part from party of the first part until full and complete settlement is made for all labor and team work done on logs, and satisfactory proof that same has been done. * * * All logs shall be bark-marked 'F' and have the end marked as designated by party of the second part. The logs must be bark-marked and end-marked before they are scaled. Life of foregoing agreement to continue up to and including driving season of 1913. * * * If logs are not delivered in 1913, \$1.00 per M feet shall be deducted from contract price."

In January, 1914, more than 400,000 feet of these logs were at Blue Creek Landing and in Blue Creek, upon which the Dover Lumber Company had paid to Derr \$7 per 1,000 feet, or a total of \$3,033.80. Whitcomb Bros., creditors of Derr, then attached the logs as the property of Derr, secured a judg-

ment against him, caused the logs to be sold, and bid them in at the sheriff's sale. This action in claim and delivery was commenced by the Dover Lumber Company asserting its ownership of, and right of possession to, the logs from January 4, 1913. The answer of Whitcomb Bros., denies ownership or right of possession in plaintiff, and alleges that plaintiff is a foreign corporation not authorized to transact business in this state. There was a reply by plaintiff, and the parties then undertook to submit the controversy for adjudication upon an agreed statement of facts which includes the purchase contract entered into between Derr and the plaintiff. The only material facts in the agreed statement, in addition to those already recited, are:

"5. The logs were bark-marked by said Derr as they were cut in the woods.

"6. The logs were scaled on the skids in the woods monthly, as provided for in the agreement.

"7. The logs were end-marked with an 'X' by John Derr, as designated by the plaintiff, on the rollways at Blue Creek Landing, on the bank of the Blue Creek, which landing was from a mile to a mile and a half from the place where said logs were cut from the trees. * * *

"13. None of the logs here in question had ever been released from said Blue Creek or Blue Creek Landing, nor driven or floated into, nor otherwise delivered into, the Clark's Fork River."

The parties also included as a part of the agreed statement the following:

"12. No person, other than Derr, was ever in actual possession of the logs prior to the sale under execution, except under the said writ of attachment and execution, unless the said act of scaling hereinabove referred to constituted such actual possession."

The trial court found for plaintiff and defendants appealed.

Section 6128, Revised Codes, provides: "Every transfer of personal property * * * is conclusively presumed, if made [1] by a person having at the time the possession or control

of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession." The meaning of this statute is not in doubt nor the wisdom of its enactment in question. To apply the rule to the sale of a bushel of grain, a dozen bricks, or single piece of lumber presents no obstacle whatever; but when the subject matter of the sale is a carload of grain, a kiln of bricks, or a half million feet of sawlogs, its practical application is not free from difficulty. The statute does not assume to demand the performance of that which is impossible or highly impracticable; neither was it designed to impose such onerous burdens on business as to effectually prevent legitimate transactions. The purpose of the statute is the prevention of frauds. It requires the surrender of control by the vendor and the assumption of possession by the vendee. Mere words are not sufficient to constitute the delivery contemplated, but, on the other hand, the law is satisfied whenever there has been such actual change of dominion over the thing sold as is practically consistent with its nature, extent and intended use, viewed in the light of the character of the transaction and the situation of the parties at [2] the time. Actual delivery, as the term is familiarly understood, is not indispensable. The transfer of possession of heavy, bulky or cumbersome articles, not capable of manual delivery, may nevertheless be effected. The delivery may be symbolical as well as actual, and the identification of the property in the hands of the new owner by the means usually employed for such purpose is generally held sufficient evidence of a change of possession. The delivery of the key to a warehouse was held to constitute a delivery of the heavy machinery in the building. (*Western Mining Supply Co. v. Quinn*, 40 Mont. 156, 135 Am. St. Rep. 612, 20 Ann. Cas. 173, 28 L. R. A. (n. s.) 214, 105 Pac. 732.) Gathering range stock into a corral and placing the purchaser's distinctive brand upon the same held sufficient evidence of a delivery and change of possession to satisfy the

statute. (*Dodge v. Jones*, 7 Mont. 121, 14 Pac. 707; *Cady v. Zimmerman*, 20 Mont. 225, 50 Pac. 553.)

The contract between Derr and the lumber company required the logs to be bark-marked and end-marked with the purchaser's mark or brand before they were scaled, and to be scaled by an agent of the lumber company. The agreed statement recites that the logs were bark-marked and end-marked, and that they were scaled in the woods, *as provided for in the agreement*. There is such a paucity of facts in the agreed statement—such an absence of material facts which it is perfectly apparent could have been supplied—that this case is unnecessarily given the appearance of presenting a very close question, *viz.*: Was there such a delivery and change of possession as will satisfy the requirements of section 6128, above? We are not informed when the logs in controversy were cut and banked. More than a year elapsed between the date of the contract and levy of the writ of attachment, and in the meantime the life of the contract expired by its own terms. We are left to make application of the rule of the statute to the very meager facts presented by the record and such inferences as may be drawn from them.

The trial court found for the plaintiff, and we indulge the [3] presumption *in limine* that the conclusion reached is justified. The appellants must assume the burden of showing that under no view of the facts disclosed will they support the judgment. As between Derr and the lumber company, title to the [4] logs passed whenever they intended it should pass (35 Cyc. 277), and we entertain no doubt it did pass when the logs were marked, scaled and removed to Blue Creek. (*Bethel Steam Mill Co. v. Brown*, 57 Me. 9, 99 Am. Dec. 752; *Northern Merc. Co. v. Schultz*, 56 Wash. 393, 105 Pac. 850; *Hagins v. Combs*, 102 Ky. 165, 43 S. W. 222.)

It is the theory of appellants that Derr was required to deliver the logs in Clark's Fork River, and that title did not pass to the lumber company because such delivery was not made. This contention ignores a salient provision of the contract. That

driving the logs to Clark's Fork River was not a condition precedent to passing title is a demonstrable fact from the concluding paragraph of the contract itself. Assuming that in the first instance it was contemplated that Derr should perform that task, his failure to do so did not affect the sale or relieve the lumber company from paying for the logs. It merely affected the amount of compensation due to Derr, and the fact that the lumber company was bound to pay, though at a reduced price, is sufficient evidence that title passed whether the logs ever reached Clark's Fork River or not.

It is apparent from the contract, considered in its entirety, that if Derr was required to move the logs to Clark's Fork River, that task was to be performed by him as the agent or employee of the plaintiff, and that his failure in this regard had the effect only of reducing the price of the logs \$1 per 1,000 feet.

The expression in the authorities to the effect that, if any-
[5] thing remains to be done by the seller, title does not pass, refers to something necessary to determine the quantity, quality or identity of the thing sold or to something necessary to put the article in the condition contemplated by the contract. (*Terry v. Wheeler*, 25 N. Y. 520.) Payment of the last installment of the purchase price was not necessary to pass title, but upon the failure of Derr to move the logs to Clark's Fork River that installment, reduced in amount as provided for in the agreement, became due at the conclusion of the driving season of 1913.

It is not material whether Derr and the lumber company observed throughout the precise order mentioned in their contract for marking, scaling and moving the logs. The facts are made to appear that the logs were identified by the purchaser's mark or brand, were removed from the place where they were cut to Blue Creek, were turned over to the lumber company to be scaled, to the end that the exact quantity for which payment should be made might be determined, the major portion of the purchase price was paid accordingly, and in this situation the life of the contract expired. Just what more could have been

done to evidence a change of possession is not suggested. Of course, the purchaser might have placed its agent in charge of the logs to keep constant watch over them, but this was not required. (*Jewett v. Warren*, 12 Mass. 300, 7 Am. Dec. 74.) If, as assumed by appellants, the contract contemplated in the first instance that Derr should drive the logs to Clark's Fork River, this would not be a deciding factor. (*Terry v. Wheeler*, above.) It is apparent from the most casual reading of the contract that the parties to it employed the term "deliver" in a very loose and unconventional sense and without regard to its legal signification. (When the logs were removed to Blue Creek, branded and scaled as required by the contract, there was not anything further to be done to determine their identity, their quantity, or their purchase price. The place where they were deposited became, in a sense, the warehouse of the purchaser. The logs were then under its immediate power and control, and this is of the very essence of a constructive delivery. (*Hutchins v. Gilchrist*, 23 Vt. 82.) If Derr was bound in the first instance to drive the logs to Clark's Fork River, his failure to do so during the season of 1913 did not operate to extend the life of the contract or the time within which he might perform that act. It merely subjected him to the penalty of losing \$1 per 1,000 feet from the original purchase price. By its own terms the contract expired with the logging season of 1913, so far, at least, as it required anything to be done by Derr.

Possession of the logs in the hands of the scaler, who was the agent of the lumber company, carried with it the *prima facie* presumption of ownership in the company (Rev. Codes, sec. 7962, subds. 8 and 11), and in the absence of any evidence to the contrary the fair presumption obtains that such possession continued to the date of the seizure under the writ of attachment (Rev. Codes, sec. 7962, subd. 32).

Paragraph 12 of the agreed statement is not a statement of fact, but a statement of mixed law and fact. Having recited the several acts done by the parties, it was a question of law whether those acts constituted possession in the purchaser.

The statute does not speak of actual possession, but of actual change of possession. Legal possession may be either actual or constructive.

Upon facts very similar to those disclosed by this record, it was held in each of the following cases that there was such delivery and change of possession as to meet the requirements of the rule of our statute: *Sanborn v. Kittredge*, 20 Vt 632, 50 Am. Dec. 58; *Hutchins v. Gilchrist*, above; *Birge v. Edgerton*, 28 Vt. 291; *Kingsley v. White*, 57 Vt. 565; *Bethel Steam Mill Co. v. Brown*, above; *Hagins v. Combs*, above; *Williamson v. Richardson*, 205 Fed. 245, 123 C. C. A. 427; *Dubois v. Spinks*, 114 Cal. 289, 46 Pac. 95.

2. Making a single contract or purchase does not constitute [6] doing business in this state within the meaning of sections 4413 and 4415, Revised Codes. (*Uihlein v. Caplice Com. Co.*, 39 Mont. 327, 102 Pac. 564; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. Ed. 1137, 5 Sup. Ct. Rep. 739.) Furthermore, this is not an action to enforce a contract.

The judgment is affirmed.

Affirmed.

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY dissents.

Rehearing denied November 26, 1917.

IN RE HUGHES.

(No. 4,099.)

(Submitted October 22, 1917. Decided October 25, 1917.)

[167 Pac. 650.]

Habeas Corpus—Proper Conviction—Indeterminate Sentence Act—Improper Sentence—Absolute Release not Imperative.

1. One found guilty of crime and sentenced to the state prison for a term not less than seventeen nor more than twenty years, whereas under the amended Indeterminate Sentence Act (Laws 1917, Chap. 16, p. 16) the minimum could not be greater—though it might be less—than one-half the maximum named in the judgment, is not for that reason entitled to his absolute discharge on writ of *habeas corpus*, but must be committed for resentence in conformity with the statute.

[As to right of prisoner who has received excessive sentence to be discharged on *habeas corpus* or appeal, see note in *Ann. Cas.* 1916D, 368.]

At Chambers.

In the Matter of Application of J. P. Hughes, convicted of rape, for a writ of *habeas corpus*. Writ granted but complainant committed for resentence.

Mr. J. D. Taylor and *Mr. Clyde Slagle*, for Complainant.

Mr. S. C. Ford, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for the State.

MR. CHIEF JUSTICE BRANTLY delivered the opinion.

Habeas corpus. On March 2, 1917, in the district court of Ravalli county, complainant was convicted of the crime of statutory rape, the jury by their verdict leaving his punishment to be fixed by the court. This the court did, pronouncing judgment on March 5 that the complainant be imprisoned in the state prison for a term of not less than seventeen nor more than twenty years. By this application he seeks his absolute release and discharge from the state prison, on the ground that the judgment is void in that it is not authorized by the Indeterminate Sentence Law (Laws 1917, Chap. 16, p. 16). By this Act the legislature amended the Act of 1915 (Laws 1915,

Chap. 14, p. 21), by prescribing a definite limit within which the court or jury, as the case may be, may fix the minimum of the term of imprisonment which may be imposed by the judgment for the particular crime. It provides that the minimum may be less than one-half of the maximum, but in no case shall it be greater. In other respects the provisions of the later Act are the same as those of the original Act. The question presented by the instant application, therefore, is substantially the same as that presented in the *Collins Case*, decided by myself at chambers (*In re Collins*, 51 Mont. 215, 152 Pac. 40), and in the *Lewis Case* subsequently decided by the court (*In re Lewis*, 51 Mont. 539, 154 Pac. 713). That the trial court in pronouncing judgment overlooked the later Act is apparent from the fact that he fixed the minimum in excess of one-half of the maximum as expressly provided by it. The judgment in its present form, therefore, furnishes no authority for holding the complainant in confinement in the state prison. He is not entitled to go free, however. Under the authority of the *Lewis Case* he is entitled to be discharged from this confinement, but he must be committed to the custody of the sheriff of Ravalli county, to be by him brought before the court of that county for sentence in conformity with the statute. Accordingly, it is so ordered.

COX, RESPONDENT, v. HALL ET AL., APPELLANTS.

(No. 3,812.)

(Submitted October 8, 1917. Decided October 26, 1917.)

[168 Pac. 519.]

Reformation of Instruments — Mutual Mistake — Complaint — Findings — Laches — Description of Land — "More or Less."

Reformation of Instruments — Mistake — Complaint — Sufficiency.

1. If the complaint in a suit looking to the reformation of an instrument on the ground of mutual mistake, alleges facts which command the inference of such mistake, it sufficiently alleges mistake, unless deliberate fraud is imputed.

Same — Mistake — Complaint — Inferences.

2. By alleging mutual mistake in a suit of the nature of the above, it is made apparent that plaintiff has been guilty of some degree of

negligence which may or may not be excusable in the circumstances of the case.

Same—Courts of Equity—Power to Grant Relief.

3. Courts of equity are not bound by cast-iron rules, but are governed by rules which are flexible and adapt themselves to particular exigencies, so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other.

Same—Mistake—Complaint—Sufficiency.

4. Complaint which alleged in substance that plaintiff had agreed to sell, and defendant to buy, a parcel of land; that he had accurately described the land to an attorney who undertook to reduce the terms of the agreement to writing, but in doing so included more land than was intended to be conveyed; that, relying upon, and having confidence in, the attorney's integrity and ability, plaintiff failed to observe the inaccuracy, as did also defendant, or made no mention of it if observing it; and that in this faulty condition the contract was completed,—*held* sufficient to state a case for reformation on the ground of mutual mistake of the parties.

[As to reformation of instruments on the ground of mistake, see notes in 30 Am. St. Rep. 621; 117 Am. St. Rep. 227.]

Same—Findings—Conformity to Issues.

5. Under the general allegation of mistake, a finding that plaintiff was a man of meager education, familiar with neither land surveys nor technical or legal descriptions of land, and unable to detect errors in such descriptions, was germane to the issues, and thus supported by the pleadings.

Same—Laches—Rule.

6. Where it appeared that, though plaintiff was given to understand that defendant would consent to the correction of the deed sought to be reformed, he was not definitely advised that correction would be refused until about eighteen months before commencing suit, and thereafter used reasonable diligence to bring his cause up for adjudication but was delayed by circumstances beyond his control, he was not barred from recovery by laches; the rule being that laches short of the period of limitations will not bar relief, unless unusual circumstances are affirmatively shown rendering relief inequitable.

Same—Description of Land—"More or Less."

7. The fact that the conveyance contained the recital that a given number of acres "more or less" was thereby transferred did not render reformation inequitable, since that expression is designed to cover small excesses or deficiencies in the acreage of a particular tract sold as such, but not to include something (21.33 acres, in this instance) which it never was the intention of the parties to include.

[As to reformation of contract because of mistake of law as to effect of instrument, see comprehensive note in 28 L. R. A. (n. s.) 900.]

Appeal from District Court, Madison County; Wm. A. Clark, Judge.

Suit by George B. Cox against M. S. Hall and another. From a decree for plaintiff and an order denying a new trial, defendants appeal.

Messrs. Callaway & Beckett, Mr. M. M. Duncan and Mr. Ike E. O. Pace, for Appellants, submitted a brief; *Mr. Lew L. Callaway* argued the cause orally.

It does not appear from the allegations of the complaint either that the mistake was mutual or that it did not occur by or result from the negligence of the plaintiff. (*American Mining Co. v. Basin & Bay State Mining Co.*, 39 Mont. 476, 24 L. R. A. (n. s.) 305, 104 Pac. 525.) The plaintiff was guilty of negligence in signing the contract, and there are no allegations whatsoever which indicate that either of the defendants was guilty of any negligence in the making of the contract. (*Lyman v. United Ins. Co.*, 17 Johns. 373, 376; *American Mining Co. v. Basin & Bay State Mining Co.*, 39 Mont. 476, 484, 24 L. R. A. (n. s.) 305, 104 Pac. 525; *Grieve v. Grieve*, 15 Wyo. 358, 11 Ann. Cas. 1162, 9 L. R. A. (n. s.) 1211, 89 Pac. 569.)

Courts will not give relief in case of a unilateral mistake by reformation of contract. (*Mills v. Lewis*, 55 Barb. (N. Y.) 179; *Forester v. Van Auken*, 12 N. D. 175, 96 N. W. 301; 34 Cyc. 915.) This action is brought to reform a contract, not to cancel or rescind one. A unilateral mistake might enable a party to secure the cancellation of a writing, but it would not enable such party to secure the reformation thereof. (*Hayward v. Wemple*, 152 App. Div. 195, 136 N. Y. Supp. 625; 6 Cyc. 286.)

The degree of carelessness which will prevent relief is stated in varying terms and depends largely upon the circumstances of the case. (16 Cyc. 69.) The mistake to entitle one to relief must not be the consequence of his own culpable inertness. (*Farrell v. Bouck*, 60 Neb. 771, 84 N. W. 260.) "Or the consequence of willful ignorance." (*Schaffner v. Schilling*, 6 Mo. App. 42.) "Or his culpable negligence." (*Compau v. Godfrey*, 18 Mich. 27, 100 Am. Dec. 133.) "Or his gross negligence." (*Picot v. Page*, 26 Mo. 398; *Schaffner v. Schilling*, *supra*.) "Or his carelessness or inattention." (*Wood v. Patterson*, 4 Md. Ch. 335; *Robertson v. Smith*, 11 Tex. 211, 60 Am. Dec. 234; *Francis v. Parks*, 55 Vt. 80.) "Or want of such diligence as might be fairly expected from a reasonable person." (*Kearney v. Sascer*,

37 Md. 264.) “Or want of ordinary prudence or vigilance.” (*Capehart v. Mhoon*, 58 N. C. 178.) “Or want of due diligence.” (*Lamb v. Harris*, 8 Ga. 546; *Thomas v. Bartow*, 48 N. Y. 193.) “Or want of reasonable diligence.” (*Keith v. Brewster*, 114 Ga. 176, 39 S. E. 850; *Brown v. Fagin*, 71 Mo. 563.) “Or want of vigilance.” (*Trippe v. Trippe*, 29 Ala. 637.) Equity does not relieve against mistakes which ordinary care could have prevented. “Conscience, good faith and reasonable diligence are necessary to call a court of equity into activity.” (*Bidder v. Carville*, 101 Me. 59, 115 Am. St. Rep. 303, 63 Atl. 303; *Riley v. Blacker*, 51 Mont. 364, 152 Pac. 758.)

Mr. M. J. Cavanaugh and *Mr. W. N. Waugh*, for Respondent, submitted a brief; *Mr. Cavanaugh* argued the cause orally.

Where parties intrust the duty of formulating a writing embodying their agreement to an attorney or scrivener, as here, and he by his own mistake or fraud embodies in it stipulations and conditions other than those agreed upon, it may be reformed at the instance of the party injured, though he signed it without reading. (*Parchen v. Chessman*, 49 Mont. 326, Ann. Cas. 1916A, 681, 142 Pac. 631, 146 Pac. 469.) The doctrine of *Hennesy v. Holmes*, 46 Mont. 89, 125 Pac. 132, has been modified in *Parchen v. Chessman*, *supra*.

In the case of *Calton v. Lewis*, 119 Ind. 181, 21 N. E. 475, it was held that the mistake might occur through inadvertence. And negligence will not defeat reformation in such a case. (*Baker v. Pyatt*, 108 Ind. 61, 9 N. E. 112.) The mistake, which is ground for the reformation of a legal instrument in equity, includes cases where the legal effect of the terms agreed upon by the parties to be employed in a written instrument, through a misapprehension or ignorance of their import, results in a contract different from that really entered into by them. (*Moore v. Tate*, 114 Ala. 582, 21 South. 820.)

The words “more or less” as used in a description declaring that the land conveyed contained a specified number of acres did not mean as estimated or supposed, but should be

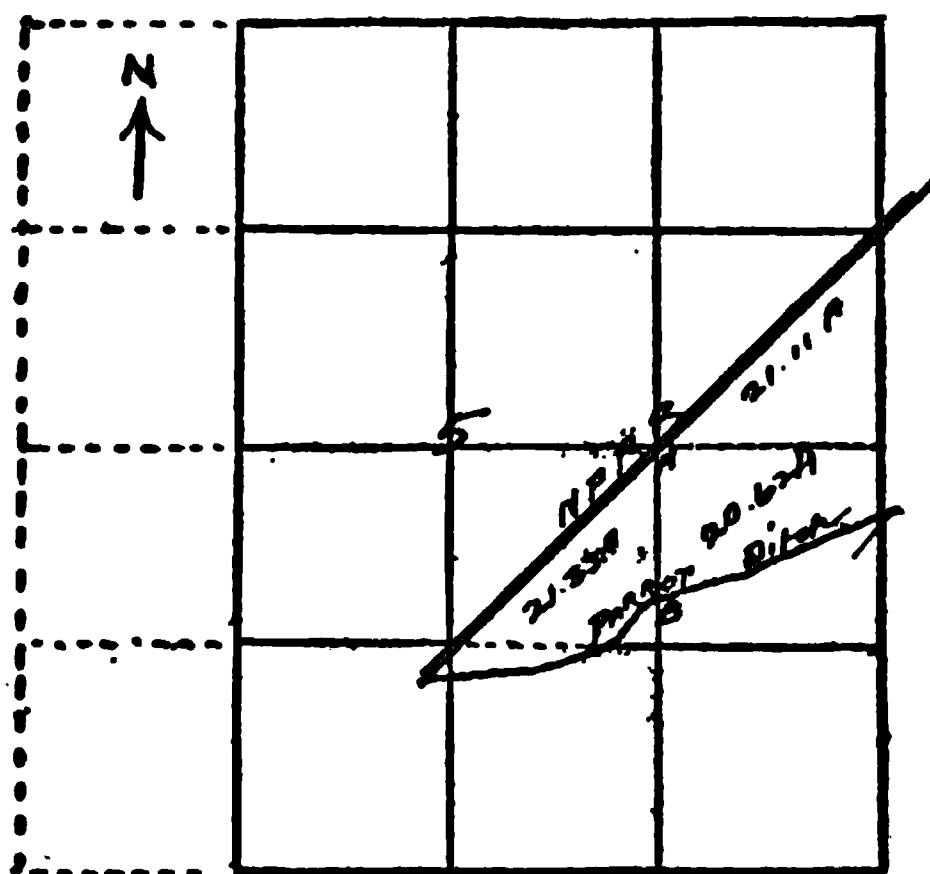
construed to mean about the specified number of acres, and are designed to cover only such small errors as usually occur in surveying. (*Crislip v. Cain*, 19 W. Va. 438; *Hodges v. Kowing*, 58 Conn. 12, 7 L. R. A. 87, 18 Atl. 979; *Tyler v. Anderson*, 106 Ind. 185, 6 N. E. 600; *Morris Canal Co. v. Emmett*, 9 Paige Ch. (N. Y.) 168, 37 Am. Dec. 388; *Shipp v. Swann*, 2 Bibb (5 Ky.), 82.) When it is evident that there has been a gross mistake as to quantity, and the complaining party has not been guilty of any fraud or culpable negligence, nor has otherwise impaired the equity resulting from the mistake, he may be entitled to relief from the technical or legal effect of his contract, whether it be executed or only executory. (*Harrison v. Talbot*, 2 Dana (32 Ky.), 258.)

The words "more or less" are intended to cover a reasonable excess or deficit. If the difference between the real and the represented quantity be very great, both parties act obviously under a mistake, which it will be the duty of a court of equity to correct. (*Thomas v. Perry*, 23 Fed. Cas. (No. 13,908) 964; *Putnam v. Hill*, 2 Russ. 520; *Hill v. Solinger*, 17 Ves. 395; *Solinger v. Jewett*, 25 Ind. 479, 87 Am. Dec. 372.) This rule was applied where land was sold as containing twenty acres, more or less, where in fact it only contained thirteen acres. (*Veeder v. Fonda*, 3 Paige (N. Y.), 94.) Where the excess or deficiency is gross, it will justify the conclusion of willful deception or mistake. (*Wylly v. Gazan*, 69 Ga. 506, 516; *Gentry v. Hamilton*, 38 N. C. 376; *Belknap v. Sealey*, 14 N. Y. 143, 67 Am. Dec. 120; *Smith v. Fly*, 24 Tex. 345, 76 Am. Dec. 109; *Couse v. Boyle*, 4 N. J. Eq. 212, 216, 38 Am. Dec. 514; *Wheeler v. Boyd*, 69 Tex. 293, 6 S. W. 614, 617.) The words "more or less" should never allow an excess or a deficit of over five per cent, except it was clearly expressed that they should cover any and all discrepancies. (*Pratt v. Bowman*, 37 W. Va. 715, 17 S. E. 210; *Bigham v. Madison*, 103 Tenn. 358, 47 L. R. A. 267, 52 S. W. 1074; *Newton v. Tolles*, 66 N. H. 136, 49 Am. St. Rep. 593, 9 L. R. A. 50, 19 Atl. 1092; *Kreiter v. Bomberger*, 82 Pa. St. 59, 22 Am. Rep. 750; *Paine v. Upton*, 87 N. Y. 327, 41 Am. Rep. 371.) The dis-

crepancy in this instance of more than twenty acres, where only forty were intended to be sold, would seem to justify the trial court, in connection with the other facts and circumstances in the case, in concluding that there was a mistake which should be remedied to prevent injustice to Cox, and an unjust enrichment of Hall.

MR. JUSTICE SANNER delivered the opinion of the court.

On and prior to April 12, 1909, the plaintiff, George B. Cox, was in the rightful possession of the E. $\frac{1}{2}$ and the E. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of section 5, Tp. 2 S., R. 5 W., in Madison county, Montana, under contract of purchase with the defendant Pace-Woods Improvement Company, which tract includes a triangular piece of ground containing 63.06 acres, as illustrated below:



The complaint alleges, in substance: That on April 12, 1909, the plaintiff and the defendant Hall completed negotiations for the purchase by Hall of that portion of said triangular tract lying east of a certain line (marked in the diagram A-B), reserving to the plaintiff a strip thirty feet wide along the east side-line as a road, for the consideration of \$1,000, to be paid by Hall to the defendant Pace-Woods Improvement Company for credit by it on Cox's contract, providing said company would assent to such agreement and would convey to Hall in accord-

ance therewith; that the parties waited upon Mr. Ike E. O. Pace, the secretary of the improvement company, and Cox, in the presence and hearing of Hall, explained the transaction to Mr. Pace, pointing out upon a map the boundaries of the piece which Hall was to receive; that the improvement company assented, and Cox thereupon instructed Pace to draw such written instruments as would be required to put the agreement into effect; that Pace, in an abortive attempt so to do, indorsed upon Cox's contract of purchase the following:

“April 12, 1909.

“George B. Cox for and in consideration of the sum of \$1.00 and other things of value does hereby release from this contract all ground between the Parrot Silver and Copper Company's Ditch, and the N. P. Ry. Co. right of way, 40 acres more or less, and contracts that same be deeded to M. S. Hall and the purchase price of \$1,000 credited on this contract. Also 40 inches of water.

“[Signed] GEO. B. COX.

“Witness: IKE E. O. PACE.”

That Pace is an attorney at law, and, because of previous dealings with him, Cox reposed confidence in his ability to understand the agreement, to reduce the same to writing, and to properly describe the land involved therein, as pointed out to him, and by such confidence Cox was led to believe, and did believe, the indorsement to correctly describe such land, “and, so believing and relying, plaintiff inadvertently signed said instrument and indorsement”; that thereafter and in a further abortive attempt to carry out the agreement between Cox and Hall, the defendant improvement company conveyed to Hall the entire triangular tract above described, and consisting of 63.06 acres, in conformity to the description contained in said indorsement; that said indorsement and conveyance are erroneous and do not express the agreement between Cox and Hall, in that they omit the western boundary of the piece sold to Hall (to-wit, the line A-B), and do include the smaller triangle containing 21.33 acres lying between the railroad and the Parrot ditch and west of the

line A-B, which never was intended to be conveyed to Hall; that thereafter plaintiff completed his contract of purchase and demanded of the improvement company a deed for the lands so contracted for, less the tract sold to Hall, and the company executed and delivered to him a deed for said lands, less the entire piece, containing 63.06 acres as described in the indorsement and conveyance to Hall, which deed the plaintiff took under protest; that after conveyance by the company to Hall, Hall advised plaintiff that the deed from the improvement company was erroneous by reason of the excess above mentioned, and agreed to have the error corrected, requesting plaintiff to ascertain from Pace what was necessary to remedy the mistake; that accordingly plaintiff called upon Pace, who answered that if Hall would bring the deed, he (Pace) would have it changed to read correctly and in accordance with the agreement, and such answer plaintiff conveyed to Hall, demanding that Hall take his deed to Pace for correction or else convey direct to plaintiff the parcel containing 21.33 acres lying west of the line A-B; but Hall has ever since failed and neglected, and now refuses, to do either; on the contrary, he has against the will and without the consent of plaintiff taken possession of said tract and ousted plaintiff therefrom, torn down the fences thereon, *etc.*: that before the commencement of this action plaintiff also demanded of defendant improvement company that it correct its said conveyances to him and to Hall so as to include in the former, and exclude from the latter, the parcel west of the line A-B, but the company has failed, neglected and refused so to do. The prayer is for a reformation and correction of the instruments accordingly, for an injunction against interference with plaintiff in the possession of the tract, for damages sustained, and for costs.

Issues were joined and the cause brought for trial before the court sitting without a jury, and the court, after hearing the evidence, made findings of fact and conclusions of law upon which a judgment and decree for plaintiff was entered. Defendants' motion for new trial was later overruled, and these appeals are the result.

1. The relief granted by the decree substantially accords with the prayer of the complaint, and defendants' first contention is that the complaint does not state facts sufficient to warrant such relief. This contention is grounded upon the proposition that no mutual mistake of the parties is made to appear; the plaintiff's plea of inadvertence in signing the indorsement being fatal to the contention of mistake, because it implies negligence on his part. The modern law of this state upon this subject is laid down in *Hennessy v. Holmes*, 46 Mont. 89, 125 Pac. 132, *Parchen v. Chessman*, 49 Mont. 326, Ann. Cas. 1916A, 681, 142 Pac. 631, 146 Pac. 469, and *Brundy v. Canby*, 50 Mont. 454, 148 Pac. 315, and these authorities establish: That when a complaint proceed-
[1-3] ing on the theory of mutual mistake alleges facts which command the inference of such mistake, unless deliberate fraud is imputed, such complaint sufficiently alleges mistake; that the term "mistake" always involves the conception that the victim has been guilty of some degree of negligence which may or may not be excusable in the circumstances of the particular case; and that courts of equity are not bound by cast-iron rules, but are governed by rules which are flexible and adapt themselves to particular exigencies, so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other. The application of these principles to the complaint before us is obvious and deci-
[4] sive. According to its allegations, plaintiff and Hall had a certain agreement. They repaired to Pace to have that agreement put in proper form. Cox in Hall's presence stated the agreement accurately; Pace presented a writing which did not state the agreement accurately, but Cox, relying on Pace's integrity and ability, failed to observe the inaccuracy; Hall likewise failed, or, if he noticed the error, made no mention of it; the result was to convey to Hall 21.33 acres of land, which neither party intended he should have in consequence of their transaction. The circumstances pleaded in principle approach those detailed in *Parchen v. Chessman*, *supra*, and if they do not suffice to warrant relief, then the entire doctrine of mistake as

ground for relief is unintelligible. We think the complaint is sufficient.

2. To us, out of the presence and hearing of the witnesses, it appears that the court below might well have reached a different result; but it would be a gross perversion to say that the findings and decree are without substantial evidence to support them. The testimony of Cox alone is sufficient, if taken as true, for that; and this testimony, supported more or less by that of others, is reinforced by the silence of Pace, who more than anyone else should have been able to tell just exactly what occurred; hence we cannot even conclude, as the defendants insist, that the findings and judgment are against the true weight of the evidence. It is vigorously argued, however, that in the last analysis the judgment rests upon findings 6 and 7, and that they have no foundation in the pleadings or the proof. As to finding 7 this is manifestly not the case; it embodies the substance of paragraphs 5, 6 and 7 of the complaint, and is well supported by [5] evidence. Finding No. 6 is "that plaintiff Cox is a man of meager education, and not familiar with land surveys or descriptions, and is unable to properly describe land, technically or legally, or detect errors in such descriptions." In point of fact this follows the testimony of Cox and, possibly, the deductions inferable from his presence and conduct. It is true that there is no specific allegation in the complaint upon this subject, but proof of the general allegation of mistake involves such considerations as are expressed by the finding; so that the finding, though unnecessary, was germane to the issues and, in this sense, supported by the pleadings.

3. It is contended that the record discloses a clear case of [6] laches which, under the maxim, "Equity aids only the vigilant," should bar recovery. The answers contain no specific plea of estoppel by laches, and the claim now made is based upon the fact that suit was not brought until April 2, 1912. The testimony shows that, although Cox had learned from Hall of the error, had been led to believe that Hall would assent to its correction, and had later learned the contrary, he was not finally advised that correction would be denied, and was therefore not

in position to seek relief in court, until he got his deed from the improvement company in November, 1910. From that time on he used reasonable diligence in bringing on his claim for adjudication, but was delayed by a series of circumstances beyond his control, until April, 1912. We have repeatedly declared that though "laches may arise from an unexplained delay short of the period fixed by the statute of limitations * * * still laches will not be presumed from such a delay alone. It must be made to appear affirmatively that unusual circumstances exist which on account of such delay render the proceeding inequitable; else relief cannot be denied on this ground." (*Brundy v. Canby, supra; Wright v. Brooks*, 47 Mont. 99, 130 Pac. 968.) No such circumstances are presented here.

4. Citing *Trinkle v. Jackson*, 86 Va. 238, 4 L. R. A. 525, 9 S. E. [7] 986, the defendants argue that the particular correction here awarded was improper, because "a contract for the sale of land, in which the tract is stated to contain a given quantity, more or less, the intention being to sell the land in gross, is one of hazard, which places upon each party the risk of excess or deficiency, and prevents each from asking relief in case the quantity proves to be different from that stated." This is true, but beside the mark. The matter in question here is, What tract did Cox agree to sell and Hall to buy? The expression, "so many acres more or less," is designed to cover small excesses or deficiencies in the acreage of a particular tract sold as such; it may be, and often is, collateral evidence to show the intent of the parties; but it cannot be used to warrant the inclusion of something which it never was the intention of the parties to include.

5. We see nothing in the criticism of the form of the decree justifying interference by us.

The judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

STATE, RESPONDENT, v. SIEFF, APPELLANT.

(No. 3,979.)

(Submitted October 15, 1917. Decided October 30, 1917.)

[168 Pac. 524.]

*Criminal Law—Malicious Burning of Property—Information—
Amendment—Defective Verdict—Circumstantial Evidence—
Insufficiency.*

**Criminal Law—Malicious Burning of Property—Information—Proper
Amendment.**

1. An information charging defendant with the malicious destruction of property, instead of with the malicious burning thereof, which latter is made a felony by section 8748, Revised Codes, was properly permitted to be amended by substituting the word "burning" for the word "destruction," in the absence of a request by defendant for a continuance or a showing that the evidence he was prepared to offer would not be equally applicable to the facts charged in the information as amended.

Same—Defective Verdict—Power of Court.

2. Under section 9323, Revised Codes, the jury, after bringing in a verdict of guilty for the malicious destruction of property, was properly directed to retire for further deliberation and return a form of verdict, under the information above, authorized by law.

Same—Clerk of District Court—Verdict—Filing-mark—Effect.

3. The act of the clerk in marking an insufficient verdict as "filed" was a mere irregularity, which could not affect the substantial rights of the defendant or prevent the jury from further deliberating of their verdict or returning a proper one.

Same—Circumstantial Evidence—Sufficiency—Rule.

4. Circumstantial evidence must point unmistakably to accused's guilt and be irreconcilable with any other rational hypothesis.

Same—Conviction—Evidence Required.

5. The guilt of one charged with crime must be established beyond a reasonable doubt; mere suspicions or probabilities are insufficient.

Same—Circumstantial Evidence—Insufficiency.

6. Evidence tending to show that defendant, charged with maliciously burning some hay in the stack on land not far distant from his own, was absent from his home on the night of the fire, made false statements as to his whereabouts, and gave voice to expressions of ill-will toward the owner thereof, was not alone sufficient to warrant conviction.

[As to the necessity that circumstantial evidence, in order to convict of crime, must exclude every reasonable hypothesis except the defendant's guilt, see note in *Ann. Cas.* 1913E, 428.]

Authorities passing on the question of *corpus delicti* in arson are collated in notes to 16 L. R. A. (n. s.) 285; L. R. A. 1916D, 1299.

On proof of *corpus delicti* in criminal case, generally, see note in 68 L. R. A. 33; specifically as to arson, see page 55 of said note.

Appeal from District Court, Dawson County; C. C. Hurley, Judge.

LOUIS SIEFF was convicted of maliciously burning property, and appeals from the judgment and an order denying him a new trial. Reversed and remanded.

Mr. H. J. Haskell and *Mr. J. A. Slattery*, for Appellant, submitted a brief, and *Mr. Sharpless Walker*, of Counsel, a supplemental one; *Mr. Slattery* argued the cause orally.

In a prosecution for arson or for the malicious burning or destruction of property, it is necessary for the state to prove beyond a reasonable doubt that the fire was of incendiary origin and that it did not arise from natural or accidental causes; also the state is required to produce evidence which directly connects the accused with the crime; likewise the burden is on the state to show that accused was personally present when the fire is alleged to have been set by him. (*State v. Pienick*, 46 Wash. 523, 13 Ann. Cas. 800, 11 L. R. A. (n. s.) 987, 90 Pac. 645; *State v. McLarne*, 128 Minn. 163, 150 N. W. 787; *State v. Delaney*, 92 Iowa, 467, 61 N. W. 189; *Gerke v. State*, 151 Wis. 495, 139 N. W. 404; *Heidelbaugh v. State*, 79 Neb. 499, 113 N. W. 145; *People v. Fairchild*, 48 Mich. 31, 11 N. W. 773; *Commonwealth v. Wade*, 17 Pick. (34 Mass.) 395; *People v. Fitzgerald*, 156 N. Y. 253, 50 N. E. 846; *Strong v. State* (Miss.), 23 South. 392; *Shannon v. State*, 57 Ga. 482, 2 Am. Crim. Rep. 56; *Spears v. State*, 92 Miss. 613, 16 L. R. A. (n. s.) 285, note, 46 South. 166; *State v. Rhodes*, 111 N. C. 647, 15 S. E. 1038; *Jones v. Commonwealth*, 103 Va. 1012, 49 S. E. 663; *State v. Morney*, 196 Mo. 43, 93 S. W. 1117; *Commonwealth v. Phillips*, 12 Ky. Law Rep. 410, 14 S. W. 378; Wharton's Crim. Evidence, 10th ed., sec. 333; 5 Corpus Juris, 572; 2 R. C. L. 514, 515.)

Mr. S. C. Ford, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for Respondent, submitted a brief; *Mr. Woody* argued the cause orally.

The *corpus delicti*, in a case of arson, consists of two elements, the fire and the cause of the fire, and although the first of these

elements is usually established by direct evidence, both of these elements may be proven by circumstantial evidence. (3 Bishop's New Criminal Procedure, sec. 53, subd. 7; 2 Wharton's Criminal Law, sec. 1062; 5 Corpus Juris, 579, 580; 2 R. C. L. 513-515; 3 Cyc. 1009.) Here the fire was proven by direct evidence, the cause of the fire being proven by circumstantial evidence. The testimony is amply sufficient to overcome any presumption that the fires were accidental, and to prove that the fires were of incendiary origin. (*Westbrook v. State*, 91 Ga. 11, 16 S. E. 100; *Davis v. State*, 141 Ala. 62, 37 South. 676; *State v. Jacobson*, 130 Minn. 347, 153 N. W. 845; *People v. Stewart*, 163 Mich. 1, 127 N. W. 816; *Spears v. State*, 92 Miss. 613, 16 L. R. A. (n. s.) 285, 46 South. 166; *State v. Pienick*, 46 Wash. 523, 13 Ann. Cas. 800, 11 L. R. A. (n. s.) 987, 90 Pac. 645.)

The facts and circumstances surrounding any one case, as disclosed by the evidence, are so essentially different from those surrounding another case that it is almost impossible to say that because the testimony in the one case was not sufficient, in another case it was not sufficient. However, we call attention to the following authorities holding evidence sufficient to sustain a conviction: *People v. Bernstein*, 250 Ill. 63, 95 N. E. 50; *Brooks v. State*, 51 Ga. 612; *People v. Stewart*, 163 Mich. 1, 127 N. W. 816; *Morris v. State*, 124 Ala. 44, 27 South. 336; *Commonwealth v. Quinn*, 150 Mass. 401, 23 N. E. 54; *State v. Cohn*, 9 Nev. 179; *People v. Levine*, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631; *Spears v. State*, 92 Miss. 613, 16 L. R. A. (n. s.) 285, 46 South. 166; *State v. Pienick*, 46 Wash. 523, 13 Ann. Cas. 800, 11 L. R. A. (n. s.) 987, 90 Pac. 645.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Louis Sieff was convicted of willfully and maliciously burning three stacks of hay belonging to H. S. Cutting, and has appealed from the judgment and from an order denying him a new trial.

1. In the original information the crime was designated the malicious destruction of property, but the facts alleged constitute

[1] a felony defined by section 8748, Revised Codes. Over defendant's objection the information was amended by substituting the word "burning" for the word "destruction" in the designation of the crime. In this no error was committed. The grade of the crime charged does not depend upon the appellation given it by the public prosecutor, but upon the facts stated. It was not necessary to mention the crime by name. The information would have been sufficient if the offense had been referred to merely as a felony. (Rev. Codes, sec. 9148.) The amendment related to a matter of form, and not of substance, and was authorized by section 9108, Revised Codes. The defendant did not ask for a continuance or suggest to the court that his rights would be prejudiced or that the evidence he was prepared to offer would not be equally applicable to the facts charged in the information as amended. (*State v. Duncan*, 40 Mont. 531, 107 Pac. 510.)

2. The verdict as first returned found the defendant guilty of malicious destruction of property. This verdict was delivered to [2, 3] the clerk, and by him indorsed "filed," but the court announced that it would not be accepted, and the jury was directed to retire for further deliberation. Later a verdict was returned which found the defendant guilty as charged in the information. It is elementary that a party cannot be charged with one crime and convicted of another independent offense. The verdict first returned was insufficient in that it did not respond to the issues tried. (12 Cyc. 690.) The malicious destruction of property is not a crime the commission of which is included in the crime of willful and malicious burning of property defined by section 8748, and it was therefore the right and duty of the trial court to require the jury to return some form of verdict authorized by law, or report a disagreement. (Rev. Codes, sec. 9323.) The act of the clerk in indorsing his file-mark upon the first verdict was, at most, a mere irregularity which could not affect adversely any substantial right of the accused. So long as the jury had not been discharged from consideration of the case, it was subject to the orders of the court.

3. To warrant a conviction in this case it was indispensable that the state prove: First, a willful and malicious burning of the property in question; and, second, that the defendant committed the crime. Assuming for the purpose of this appeal that the *corpus delicti* is established, the material inquiry presented by this record is: Does the evidence fix the guilt upon defendant?

Aside from evidence tending to show that the fire was of incendiary origin, there was introduced testimony descriptive of Cutting's premises, and which concerned particularly the relative locations of his buildings, the haystacks in question, and some fences and roads, but this evidence is practically meaningless. It was given with reference to two maps with certain marks and figures upon them which were before the witnesses, but which were not introduced in evidence and are not before us. Whatever value the evidence may have had, it is not suggested that it tended to connect the defendant with the commission of the crime.

We agree with the Attorney General that his *résumé* of the evidence upon the branch of the case now under consideration comprehends every material fact concerning which the state's witnesses testified. Those facts are:

About 7:30 o'clock on the evening of September 30, 1915, the defendant left his home riding a black horse belonging to Frank Lacrousiere, for the purpose, as he declared, of getting some cattle which a man had for him. About 10 o'clock of the same evening Lacrousiere, Marie Purdy and Jessie Purdy, who were staying at defendant's house, discovered that Cutting's haystacks were on fire. The hay was near the Cutting home, about a mile from and in plain view of defendant's residence. About a half hour later defendant returned, coming from the direction of Johnson's, riding in a gallop or running his horse, and, when asked by Lacrousiere if he had seen the fire, he asked where, and when told at Cutting's, he replied: "It serves the son-of-a-bitch right; he had it coming." Defendant then remarked to Lacrousiere: "If anybody asks you if you saw the fire, just tell them you saw it in the morning." On the morning following Lacrou-

sire complained that his horse which defendant had ridden was badly wire-cut, but defendant denied any knowledge of it, and said the horse was not cut when he returned the night before. There was fresh blood on the horse and on the chaps which defendant wore. To the Misses Purdy defendant remarked two or three times: "If anybody asks where I was last night or what I was doing while you were here, tell them you don't know anything about Louis Sieff's business." In response to an expression of sympathy for Mr. Cutting by Marie Purdy, defendant said: "Anybody that will take the handle off his pump to keep people from getting water can't expect anything else." To the sheriff, more than a month later, defendant at first stated that he was not away from home on the night of the fire and did not know of it until the morning following. When informed that Lacrousier and the Purdy sisters had been interviewed, defendant admitted that he was away from his home, but declared that he was looking after his cattle, and that he rode a gray horse, not a black one. Lacrousier testified that he had never been to Cutting's place because defendant had told him that Cutting was not a nice fellow. The testimony introduced on behalf of the defendant did not aid the prosecution in any respect; on the contrary, it tended to exonerate the accused.

Viewed in the light most favorable to the state, this evidence [4] falls far short of the requirements of the statute. By the widest stretch of the imagination these facts cannot be so arrayed that it can be said they point unmistakably to defendant's guilt, and are altogether irreconcilable with any other rational hypothesis; and this is the test in this state applicable to every criminal case in the trial of which the state relies, as in the instance, upon circumstantial evidence. (*State v. Postal Telegraph-Cable Co.*, 53 Mont. 104, 161 Pac. 953; *State v. Chevigny*, 48 Mont. 382, 138 Pac. 257; *State v. Suitor*, 43 Mont. 31, Ann. Cas. 1912C, 230, 114 Pac. 112.)

There is not a suggestion in the record that the defendant was [5, 6] about the Cutting premises on the night of the fire; that

anyone was seen in the vicinity of the hay about the time the fire started; that any person was observed leaving the scene of the crime about the time the fire was discovered, or at all, or that any tracks were discoverable leading from the haystacks in the direction of defendant's place or elsewhere. So far as this record discloses, the defendant was not nearer than a mile to the hay in question on the night it was burned. True the defendant was away from home, which afforded him an opportunity to commit the crime; but the evidence also discloses that others in the neighborhood were absent from their respective residences at the same time, each with an equal opportunity. The defendant may have had ample justification for his expression of ill-will or lack of sympathy toward Mr. Cutting; but, whether he had or not, such expressions do not disclose a willingness or purpose to commit a felony and are not inconsistent with the defendant's innocence. If proof of this character will support a conviction, then no man may safely tell the truth about his neighbor unless the truth commands a eulogy. This is not common sense and is not the law. However obliquitous lying may be from a moral standpoint, it is not *per se* a crime in this state, and proof that defendant made false statements is not sufficient to show that he willfully and maliciously set fire to the hay in question. It must be borne in mind that the law does not call upon defendant to explain his absence, his apparent falsehoods, or his animosity toward the prosecuting witness. The burden was upon the state throughout to establish his guilt beyond a reasonable doubt. (Sec. 8028, Rev. Codes.) While this evidence would be material and relevant in corroboration of other incriminating facts and circumstances, it has little probative value standing alone. At most, it does not do more than cast a suspicion upon the defendant, and mere suspicions or probabilities, however strong, are not sufficient basis for a conviction. (*State v. McCarthy*, 36 Mont. 226, 92 Pac. 521; *State v. Taylor*, 51 Mont. 387, 153 Pac. 275.)

The judgment and order are reversed and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STATE ~~EX~~ REL. EISENHAUER, RELATOR, v. DISTRICT
COURT ET AL., RESPONDENTS.

(No. 4,103.)

(Submitted October 17, 1917. Decided October 30, 1917.)

[168 Pac. 522.]

*Certiorari—Executors and Administrators—Attorney's Fees—
Probate Courts—Jurisdiction.*

Probate Courts—Extent of Jurisdiction.

1. A district court sitting in probate has only such jurisdiction as is specially conferred or necessarily implied.

Courts—Jurisdiction—Power to Enforce.

2. Whenever jurisdiction is conferred upon a court, all the means necessary to carry the same into effect are expressly provided by Revised Codes, section 6329, and if a court has power to make an order it has jurisdiction to enforce it.

[As to relief in equity from orders and decrees of the probate court, see note in 106 Am. St. Rep. 639.]

Executors and Administrators—Liability for Attorney's Fees.

3. The employment and payment of counsel by an executor are matters of personal and private contract between the two; hence the former has no claim against the estate for his compensation, and if the latter does not voluntarily pay for the services, the attorney must seek redress in an ordinary action at law against him.

Same—Allowance of Attorney's Fees—Jurisdiction.

4. An executor may reimburse himself from the funds of the estate in his charge, for money necessarily expended by him for legal services, by presenting his claim therefor for allowance; but until the attorney's fee has been actually paid, there can be no claim presented for approval, and the court is without jurisdiction to allow any amount for such expenses.

Same—Jurisdiction—Consent cannot Confer.

5. Where the probate court is without jurisdiction to allow an expenditure of the nature of that above referred to, consent by the executor cannot confer it.

On liability of estate to attorney employed by executor or administrator, see note in 25 L. R. A. (n. s.) 72.

Application for writ of *certiorari* by the State, on the relation of Nellie Eisenhower, as executrix of the estate of John B. Sattes, deceased, against the Second Judicial District Court in and for Silver Bow County and John V. Dwyer, a Judge thereof, to set aside an order allowing attorney's fees. Order vacated.

Messrs. Canning & Geagan, for Relator.

Messrs. Walsh, Nolan & Scallon, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

During the course of the administration of the estate of John B. Sattes, deceased, on March 20, 1917, a petition was presented to the district court, signed by the executrix and Fred Sattes, the two principal beneficiaries under the will, praying that an order be made fixing and allowing the attorney fee to be paid out of the funds of the estate by the executrix to James T. Fitzgerald for professional services rendered and to be rendered by the attorney to the executrix in advance of any payment made by the executrix to the attorney, which amount so fixed and allowed should thereafter be included in the final account and presented for settlement and allowance. On March 28 notice of the discharge of the attorney was filed, and on March 30 a motion was presented to dismiss the petition for the allowance of attorney's fees and to set aside the inventory and appraisement theretofore returned. The motion was supported by the affidavits of the executrix and Fred Sattes, which disclosed the reason assigned by them for their proceedings. The petition and motion were heard together, resulting in an order denying the motion and granting the prayer of the petition. The order, so far as material here, follows: "It is therefore ordered, adjudged, and decreed, and this does order, adjudge, and decree, that the sum of two thousand five hundred (\$2,500.00) dollars be, and the same hereby is, allowed by the court to said Nellie Eisenhower, executrix as aforesaid, for the said attorney and counsel, James T. Fitzgerald, as and for compensation for the

services herein rendered and performed by him for said executrix and estate, as an expense in the care, management, and administration of said estate by said executrix, and as special administratrix thereof." The purpose of this proceeding is to have the order annulled, and the single question presented is: Did the court in making the order act without, or in excess of, jurisdiction?

A district court sitting in probate has only such jurisdiction [1] as is specially conferred or necessarily implied. (*Buller-dick v. Hermsmeyer*, 32 Mont. 541, 81 Pac. 334.) The order in question is either an adjudication upon a matter properly before the court, or it is merely an extrajudicial opinion by the judge presiding. If it belongs to the first class, it is enforceable by the court, and the executrix can be compelled to pay the entire account out of the funds belonging to the estate, whether she is willing to do so or not. If she cannot be compelled to make such payment, it is only because the court was without authority to make the order. It would be a contradiction of terms to say that a court has jurisdiction to make a particular order but no [2] jurisdiction to enforce it. Whenever jurisdiction is conferred, all the means necessary to carry the same into effect are provided. (Rev. Codes, sec. 6329.)

It is settled beyond further controversy in this jurisdiction that the employment and payment of counsel by the executrix [3] are matters of purely personal and private contract between the executrix and the attorney; that the attorney has no claim against the estate for his compensation, and, if the executrix does not voluntarily pay for such services, the attorney must seek redress in an ordinary action at law. (*State ex rel. Kelly v. District Court*, 25 Mont. 33, 63 Pac. 717; *First Nat. Bank v. Collins*, 17 Mont. 433, 52 Am. St. Rep. 695, 43 Pac. 499; *State ex rel. Cohen v. District Court*, 53 Mont. 210, 162 Pac. 1053.) With the contract between the executrix and the attorney the probate court has no concern. It cannot construe or enforce it, and the interests of the estate cannot be jeopardized, whatever its terms may be. The attorney must look to the executrix

alone for his compensation, and his contract of employment can be enforced only in the manner that other private contracts of like character are enforceable. The only liability for the attorney's compensation is the personal liability of the executrix.

[4] For money actually expended for legal services, the executrix may have a valid claim against the estate. This claim she may present as for an item of expense incurred in the due course of administration, and if the services were necessary, and the amount paid is reasonable, and if the claim is allowed and approved by the court, and no appeal is taken from the order allowing it, the executrix may reimburse herself from the funds of the estate; but, until the attorney fee has been actually paid by the executrix, she cannot have any claim against the estate therefor, and consequently the court cannot have before it anything upon which to act in determining the reasonableness or necessity of the claim. Our statute practically determines this. Section 7631, Revised Codes, provides that the executrix "shall be allowed all necessary expenses in the care, management and settlement of the estate, including reasonable fees *paid* to attorneys for conducting the necessary proceedings," etc. Our Codes also provide the method by which the executrix may secure the allowance of any such claim, and that method is exclusive. Article II (secs. 7634-7652) requires the executrix to render to the court accounts under oath showing the money received and expended (sec. 7634), with a voucher or receipt for every item of expense which exceeds \$20 (secs. 7634 and 7644). When such an account is rendered, the court or judge must appoint a day for hearing, and the clerk must give the statutory notice (sec. 7645). Any person interested in the estate may file his exceptions and contest the allowance of the account in whole or in part (sec. 7647); but if the court settles and allows the account, such determination is conclusive (if no appeal is taken) against all persons, not under legal disability (sec. 7649).

In 1 Woerner's American Law of Administration, second edition, section 152, the principles to which we have adverted are stated as follows: "Upon the same principle, probate courts

have no jurisdiction to decree payment to persons employed by the executor or administrator to render services for him, or for the estate, in its administration. Although it may be the duty of the court, in passing upon the administration account, to determine the reasonableness of payments for such services, and allow or reject the credits taken therefor, it has not the power, unless expressly granted by statute, to adjudicate upon the claims of such persons against the administrator; their remedy, if he refuse to pay, is in another court. Thus, while the court may make an allowance to an administrator who performs services for the estate, as an attorney at law, not within the scope of his duties as an administrator, in states where the statute provides for extra compensation aside from the regular commissions. or allow him credit for counsel fees properly paid, it has no jurisdiction to order the payment of counsel fees by the administrator."

Counsel for respondents refer to decisions by the supreme court of California which hold that the court may fix the amount of the attorney fee to be paid out of the assets of the estate, in advance of payment and in the absence of any report by the representative, but these decisions are apparently justified only by the usual and ordinary course of practice adopted and pursued in that state. Concerning the California doctrine, Woerner says: "But it appears from the cases above cited that the contrary is well established as the general rule." (Sec. 356.)

It appears from the record before us that notice of the hearing upon the petition was not given as required by statute; but, waiving this aside for the purpose of this proceeding, we prefer to ground our decision upon the fundamental principle that the executrix is the only one who can have any claim against the estate for attorney's fees, and that the executrix cannot have such a claim until the fees have been paid. Until they have been paid and properly reported to the court, the court has no jurisdiction to adjudicate upon the necessity of the services or the [5] reasonableness of the amount of the claim, and consent by the executrix cannot confer jurisdiction. The order in question

amounts to nothing more than an extrajudicial opinion by the judge of the lower court, and is not binding upon or enforceable against the executrix or the estate.

The order is vacated and set aside.

Order vacated.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

FALLIGAN, APPELLANT, v. SCHOOL DISTRICT No. 1,
RAVALLI COUNTY, ET AL., RESPONDENTS.

(No. 3,807.)

(Submitted October 6, 1917. Decided November 1, 1917.)

[169 Pac. 803.]

*Public Schools—School Teachers—Contracts of Employment—
Renewal Under School Code—Statutes—Retroactive Effect.*

Statutes—Retroactive Effect—Rule.

1. Retroactive effect is not to be given to a statute unless commanded by its context, terms or manifest purpose.

[As to when a retrospective statute is valid, see notes in 6 Am. Dec. 730; 10 Am. Dec. 131; 111 Am. St. Rep. 455.]

Public Schools — Teachers — Re-employment — School Code — Retroactive Effect not Permissible.

2. *Held*, under the above rule, that where a teacher was re-employed for the second time before the enactment of the General School Code (Laws 1913, Chap. 76), section 801 of which (p. 244) provides for an automatic renewal of the contract of employment after election for the second consecutive year, etc., but does not command that a retroactive effect shall be given its provisions, the court properly sustained a general demurrer to her complaint in an action against the school board for breach of contract.

Same—School Code—Automatic Renewal of Contract of Employment.

3. *Quære*: Are the provisions of section 801, *supra*, available to principals and teachers whose two-year period of employment antedates, but whose re-engagement occurred after, the passage of Chapter 76, Laws of 1913?

Appeal from District Court, Ravalli County; R. Lee McCulloch.

ACTION by Ella Falligan against School District No. 1 of Ravalli County, and the Board of Trustees of said district. Plaintiff appeals from a judgment entered after a general demurrer to the complaint had been sustained. Affirmed.

Mr. William L. Murphy, for Appellant, submitted a brief.

Mr. J. D. Taylor and *Mr. E. C. Kurtz*, for Respondent, submitted a brief; *Mr. Kurtz* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

In May, 1911, the plaintiff, a teacher qualified by life diploma of the state board of education, was elected to teach in the public schools of District No. 1, Ravalli county; in September, 1912, she was re-elected for the ensuing school year; in March, [2] 1913, the legislature passed and the governor approved what is now known as the General School Code (Chapter 76, Laws of 1913), wherein it is provided that "after election of any teacher or principal for the second consecutive year in any district in the state such teacher or principal so elected shall be deemed re-elected from year to year thereafter unless the board of trustees shall by a majority vote of its members on or before the first day of May give notice in writing to such teacher or principal that his services will not be required for the ensuing year, provided, that in case of principals in charge of school systems such notice shall be given on or before February 1st" (sec. 801, 13th Sess. Laws, 244); some time prior to September 8 and after May 1, 1913, the board of trustees designated a successor to the plaintiff as such teacher, and thus in effect removed her from her position without proceeding as required by the section above quoted; since that time the board has refused to permit her to perform any duties as a teacher, has abrogated and disclaimed any contract of employment with her, and has refused to pay her any compensation, although she has at all times held herself in readiness to perform such duties. Upon her complaint stating these facts and claiming a contract to ex-

ist in virtue of the section above quoted, she seeks compensatory damages. A general demurrer to the complaint was sustained, and the plaintiff, declining to plead further, suffered judgment to be entered against her, from which this appeal is taken.

The question involved is the construction and application of the section quoted. The language employed indicates that it [3] is to have an effect wholly prospective; but whether its provisions are available to principals and teachers whose two-year period antedates, but whose re-engagement occurred after, the passage of the Act is not clear. Certain it is that few, if any, of the considerations which might be urged in support of such an application are presented here, because the plaintiff's re-engagement occurred before the passage of the Act. It cannot be said that she was re-engaged with the provisions and consequences of the section in mind, and to inject these provisions and consequences into her contract, made before the passage of the Act, is to materially alter the terms of that contract—to give her something which she did not have, *viz.*, an automatic renewal under certain circumstances. While no constitutional barriers other than those stated in section 11, Article III of our Constitution exist to restrain retroactive legislation in this state, and while a certain amount of retrospection [1] is necessarily involved in many of our laws, it is nevertheless a fundamental rule of construction that retroactive effect is not to be given to a statute unless commanded by its context, terms or manifest purpose. (Rev. Codes, sec. 6213; *Bullard v. Smith*, 28 Mont. 387, 72 Pac. 761; Black on Interpretation, secs. 12 and 103.) The material alteration in the terms of plaintiff's contract required by the contention here pressed is not a result which we can hold as within the contemplation of the section in question, because it is not so commanded.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

STATE, RESPONDENT, v. KANAKARIS, APPELLANT.

(No. 4,012.)

(Submitted November 6, 1917. Decided November 12, 1917.)

[169 Pac. 42.]

Prostitutes—Accepting Money from and Living With—Information—Charging Two Offenses—Waiver—Evidence—Insufficiency—Trial—County Attorney—Misconduct—Cross-examination—Instructions—Witnesses.

Prostitutes—Accepting Money from and Living With—Information—Charging Two Offenses—Waiver.

1. Motion to compel the county attorney to elect as between two offenses charged in an information contrary to section 9151, Revised Codes, was not, but a demurrer was, the proper manner in which to raise the objection; by pleading over and failing to demur, the objection was waived.

Same—Evidence—Insufficiency.

2. Defendant was charged with receiving some of the earnings of a prostitute in violation of section 8, Chapter 1, Laws of 1911, and with living with, and depending for his living, in whole or in part, upon money supplied by, her (sec. 9); the evidence tended to prove him guilty of the first, but the jury found a verdict of guilty upon the second charge, although there was no evidence to support it. *Held*, that the verdict was not supported by the evidence.

Criminal Law—Trial—Leading Questions—Denial of Fair Trial.

3. The asking of numerous leading questions by the prosecution, over objection of defendant, may justly be cause for complaint that by the course adopted he was denied the fair and impartial trial guaranteed by the Constitution.

Same—Evidence—Degrading Witness.

4. Questions asked the defendant upon his cross-examination for the purpose of impeaching or degrading him in the estimation of the jury were improper.

Same—Repetition of Questions—County Attorney—Misconduct.

5. Where an objection to a question is sustained because improper in form, the form may be varied and the question repeated; but where it is sustained because the question seeks to elicit inadmissible evidence, the action of the county attorney in repeating it to three different witnesses, after an objection to it had been sustained when first interposed, was contemptuous, and must have resulted in prejudice to appellant.

Same—Error—Defendant may not Complain, When.

6. Of an error in instructions by which the court imposed upon the state the burden of proving both offenses charged, in order to establish one of them, defendant was not in position to complain.

Generally on the question of duplicity of offenses in indictment, see note in 49 L. R. A. (n. s.) 453.

For authorities discussing the question on cross-examination of witness as proper mode of proving conviction of crime for purposes of impeachment, see note in 30 L. R. A. (n. s.) 846.

Same—Credibility of Witnesses—Improper Instruction.

7. An instruction that the jury could disregard the entire testimony of any witness whom they believed to have deliberately testified falsely to any fact material to the issue, *etc.*, was erroneous under section 8028, Revised Codes, subdivision 3.

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

GUST KANAKARIS was convicted of a violation of certain provisions of Chapter 1, Laws of 1911, and from the judgment and order denying his motion for new trial he appeals. Reversed and remanded for new trial.

Mr. H. C. Crippen and *Mr. J. H. Johnston*, for Appellant, submitted a brief; *Mr. Crippen* argued the cause orally.

Mr. S. C. Ford, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for the State, submitted a brief; *Mr. Woody* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The defendant was prosecuted for a violation of certain provisions of Chapter 1, Laws of 1911, was convicted, sentenced to imprisonment in the penitentiary for not less than fifteen years, nor more than twenty years, and has appealed from the judgment and from an order denying his motion for a new trial.

1. The charging part of the information follows: "That the said Gust Kanakaris, then and there being, then and there, a male person, willfully, wrongfully, unlawfully and feloniously did live with and in whole and in part upon the earnings of, and money supplied by one Ollie Nunley, she, the said Ollie Nunley, being then and there a common prostitute and woman of bad repute, and he, the said Gust Kanakaris, did, then and there, knowingly, willfully, wrongfully, unlawfully and feloniously accept, receive, levy and appropriate money, without consideration, from the proceeds and earnings of the said Ollie Nunley, while so engaged in prostitution." That this informa-

tion charges two distinct offenses in violation of the provisions of section 9151, Revised Codes, is apparent.

Chapter 1 above consists of twelve sections. Sections 10 and 11 are the repealing clauses, and section 12 prescribes when the Act shall take effect. Each of the first nine sections defines a separate and distinct offense and provides the punishment therefor. Section 8 brands as a felon everyone, whether male or female, who knowingly and without consideration takes or receives from a woman engaged in prostitution any of the earnings of her shame. This section was designed to prevent the levy of tribute upon the occupation of women of the underworld or the gratuitous receipt of any of the proceeds of their prostitution, knowing it to be such, by the imposition of fine or imprisonment, or both fine and imprisonment, for a violation of its provisions. By enacting section 9, the legislature evinced a purpose to drive out of this state every vagabond, pimp and secretary who lives with a common prostitute or who depends for his living, in whole or in part, upon money supplied by a fallen woman, whether that money be earned in legitimate business or derived from her unlawful occupation. The punishment was adjusted to effectuate the purpose, for every violation of the section subjects the offender to imprisonment in the penitentiary without the alternative privilege of paying a fine and remaining at large. (*State v. Jones*, 51 Mont. 390, 153 Pac. 282.)

The most cursory reading of the information discloses that [1] the defendant was charged with a violation of section 8, and also with a violation of section 9. "The indictment or information must charge but one offense." (Sec. 9151, Rev. Codes.) Counsel for the defendant sought to avail themselves of the defect, by a motion to compel the county attorney to elect, as between the two offenses charged, the one upon which he would seek conviction; but they were in error as to their remedy. Section 9208, Revised Codes, provides that, when it appears upon the face of the information that more than one offense is charged, the objection "can only be taken by demurrer"; and, by pleading over and failing to demur, the objection was deemed

to be waived so far as any question of pleading is concerned. (Sec. 9353, Rev. Codes; *State v. Mahoney*, 24 Mont. 281, 61 Pac. 647; *State v. Gordon*, 35 Mont. 458, 90 Pac. 173.)

2. The verdict returned declared the defendant "guilty of the [2] crime of living upon the earnings of a woman engaged in prostitution as charged in the information." In other words, he was adjudged guilty of violating the provisions of section 9 of the chapter under consideration.

3. The evidence tends to prove that the defendant, who was proprietor of a rooming-house, induced a woman employed by him as chambermaid to engage in prostitution and to divide with him the proceeds of her illicit practices, and it goes no further. On the contrary, the evidence is not in dispute that defendant never lived with the woman, and, so far as it tends to any conclusion upon the subject, it establishes that he had independent means and was not dependent for his living, in any degree, upon the money furnished by the prostitute.

4. The record presents this singular situation: The defendant was charged with two distinct offenses; the evidence tends to prove him guilty of one only, while the jury found him guilty of the other one. It is elementary that, if the evidence does not prove the commission of the crime of which the defendant is convicted, it is insufficient to sustain the verdict, even though it tends to prove another and independent offense.

5. During the examination of witnesses for the state, the [3] county attorney, over the objections of the defendant, asked numerous leading questions. Section 8019, Revised Codes, provides: "On a direct examination leading questions are not allowed, except in the sound discretion of the court, under special circumstances making it appear that the interests of justice require it." This court does not reverse a judgment of conviction, for mere technical irregularities which could not affect injuriously any substantial rights of the accused; but such a course of trial procedure may be adopted and pursued that the losing party may complain justly that he was denied the fair and impartial trial guaranteed to everyone by the Constitution of

this state. It is not necessary to consider these assignments further, for it is not probable that the errors will be committed upon another trial of this cause.

6. Upon the cross-examination of the defendant he was asked many questions by the county attorney, the purpose of which [4] was to show that he had been guilty of numerous minor offenses, independent of the crime for which he was being tried. The attorney could have had no other object in view than to impeach the defendant or degrade him in the estimation of the jury, and for either purpose the questions are forbidden by statute. (Secs. 8024 and 8031, Rev. Codes); *State v. Rogers*, 31 Mont. 1, 77 Pac. 293.)

7. To the witness Schultze the county attorney propounded [5] certain questions to each of which an objection was interposed and sustained. Three other witnesses were then called to the stand by the county attorney, and to each one of them he propounded the same or similar questions, with the same result. The conduct of the attorney was contemptuous, and from the character of the questions must have resulted in prejudice to the accused. If an objection is sustained upon the ground that the question is improper in form, the form may be varied and the question repeated; but, when an objection is sustained upon the ground that the evidence which the question seeks to elicit is inadmissible, there cannot be any justification for repeating it. This subject has recently received extended consideration from this court which need not be repeated here. (*State v. Jones*, 48 Mont. 505, 139 Pac. 441.)

8. Complaint is made of instruction No. 3 given by the court. [6] The instruction is erroneous, but the error was committed against the state. The defendant cannot complain that the court imposed upon the prosecution the burden of proving both offenses charged, in order to establish one of them. There is not any merit in the other assignments.

9. As this cause must be remanded for a new trial, attention [7] is directed to the last paragraph of instruction 12, as follows: "If you believe from all the evidence in the case that any

witness who has testified in this case has willfully and deliberately testified falsely to any fact or matter material to the issue involved herein, then you will be at liberty to disregard the entire testimony of any such witness, except in so far as it may be corroborated by other and credible evidence in the case." This instruction is erroneous, is contradictory of subdivision 3, section 8028, Revised Codes, and has been condemned by this court. (*State v. Penna*, 35 Mont. 535, 90 Pac. 787, overruling *State v. De Wolfe*, 29 Mont. 415, 74 Pac. 1084.)

The judgment and order are reversed and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STATE, RESPONDENT, v. SHELDON, APPELLANT.

(No. 3,895.)

(Submitted November 5, 1917. Decided November 13, 1917.)

[169 Pac. 37.]

Criminal Law—Mayhem—Information—Sufficiency—Insanity—Uncontrollable Impulse—Evidence—Offer of Proof—Animus of Witnesses—Harmless Error—Instructions.

Mayhem—Information—Sufficiency.

1. *Held*, that the right testicle of a male human being is a "member of the body," within the meaning of section 8304, Revised Codes, defining the crime of mayhem.

[As to what constitutes mayhem, see note in 65 Am. St. Rep. 771.]

Same—Insanity—Uncontrollable Impulse—Evidence.

2. Defendant having testified to an uncontrollable impulse to commit the act of mayhem and the causes thereof, one of which was certain information imparted to him by the prosecuting witness touching defendant's family, questions designed to bring out the accuracy of such information were immaterial, the material fact being that he had such information.

On the question as to whether irresistible impulse is excuse for crime, see notes in 18 L. R. A. 224; 27 L. R. A. (n. s.) 461.

On burden of proof as to sanity, see note in 36 L. R. A. 726; 44 L. R. A. (n. s.) 119.

Same—Cross-examination—*Animus* of Witness—Harmless Error.

3. Refusal to require a medical expert to answer questions put to him by defendant's attorney on cross-examination and designed to search his *animus* in testifying, *held* harmless error where several other experts, unchallenged for bias, had testified to the same matters as he had done.

Same—Instructions—Proper Refusal.

4. An instruction postulating facts not shown by the evidence and authorizing indefinite and misleading inferences was properly refused.

Same—Insanity—Burden of Proof—Correct Instruction.

5. An instruction that, the law presuming every person to be sane, the burden of presenting the issue and of furnishing evidence sufficient to raise a reasonable doubt upon the subject, is upon the accused person claiming insanity as a defense, was correct.

Same—Insanity—Burden of Proof—Harmless Error.

6. An instruction relative to the burden of proof on the issue of insanity, which employed the word "guilt" for the word "insanity," *held* harmless, if error, in view of the whole charge submitted to the jury.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

CHAUNCEY A. SHELDON was convicted of mayhem, and from the judgment and order denying him a new trial he appeals. Affirmed.

Mr. Wellington D. Rankin, for Appellant, submitted a brief and argued the cause orally.

The court's instructions on the burden of proof on the question of insanity were erroneous and conflicting. It is well settled in this state that when conflicting propositions of law are given to a jury on a material point, one of which is correct and the other incorrect, as here, the error is fatal. (*State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169; *State v. McClellan*, 23 Mont. 532, 75 Am. St. Rep. 558, 59 Pac. 924; *State v. Jones*, 48 Mont. 505, 139 Pac. 441; *People v. Ross*, 19 Cal. App. 469, 126 Pac. 375; *State v. Thompson*, 31 Utah, 228, 87 Pac. 709; *State v. McPherson*, 72 Wash. 371, Ann. Cas. 1914D, 587, 130 Pac. 481; *Jones v. State*, 89 Ark. 213, 116 S. W. 230; *Danford v. State*, 53 Fla. 4, 43 South. 593; *Barrett v. State*, 55 Tex. Cr. 182, 115 S. W. 1187.)

The court erred in excluding the evidence offered to show that the complaining witness had borrowed money from de-

fendant's wife. It should have gone to the jury as bearing on the condition of the defendant's mind at the time the act was committed and as corroborating the testimony of the defendant. (7 Ency. of Evidence, 449; *People v. Hoch*, 150 N. Y. 291, 44 N. E. 976, 981; *People v. Wood*, 126 N. Y. 249, 27 N. E. 362; *State v. Constantine*, 48 Wash. 218, 93 Pac. 317; *State v. Bradley*, 120 La. 248, 45 South. 120.)

It is always proper to show the interest of a witness in the result of a case for the purpose of affecting his credibility. For that purpose it is competent to show that the witness has been promised pay for testifying. (3 Ency. of Evidence, 769, 771; 40 Cyc. 2489; 1 Wharton's Criminal Evidence, 1011; *State v. Wakely*, 43 Mont. 427, 117 Pac. 95; *People v. Rice*, 130 Mich. 350, 61 N. W. 540; *State v. Krum*, 32 Kan. 372, 4 Pac. 621; *State v. Collins*, 33 Kan. 77, 5 Pac. 368.)

Applying the facts set out in the information to the common-law definition of mayhem, it follows that it does not state facts sufficient to constitute the crime of mayhem. (3 Cooley's Blackstone, sec. 121; 4 *Id.*, sec. 205.) It is a matter of common knowledge that the removal of a testicle does not render a person the less able to fight, either on the defensive or offensive. (3 Wharton & Stilles Medical Jurisprudence, 124.)

In some of the states, statutes have been enacted enlarging upon the common-law definition of mayhem, for the purpose of embracing a situation as set out in the information in this case, but in Montana no such statute has been enacted, and the statute simply embraces the common-law definition of mayhem.

It is a question for the jury as to whether the right testicle is a member of the body. (*Slattery v. State*, 41 Tex. 619; *High v. State*, 26 Tex. App. 545, 8 Am. St. Rep. 488, 10 S. W. 238.)

Mr. S. C. Ford, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for the State, submitted a brief; *Mr. Woody* argued the cause orally.

We understand the law to be well settled in this state that when a person is charged with the commission of a crime, the

burden of proof rests with the state to prove beyond a reasonable doubt every essential ingredient of the crime charged, but when a defendant interposes an affirmative defense, such as alibi or insanity, then the burden is on the defendant to introduce evidence sufficient to raise a reasonable doubt as to his guilt, and when such evidence has been introduced by the defendant, then the burden shifts to the state to rebut this proof and establish the guilt of the defendant beyond a reasonable doubt. (*State v. Felker*, 27 Mont. 451, 71 Pac. 668; *State v. Halk*, 49 Mont. 173, 141 Pac. 149.) And from the decisions of this court in the cases of *State v. Peel*, 23 Mont. 358, 59 Pac. 169, *State v. Crowe*, 39 Mont. 174, 18 Ann. Cas. 643, 102 Pac. 579, and *State v. Leakey*, 44 Mont. 354, 120 Pac. 234, we also understand the rule to be, in a case where a defense of insanity is interposed, that in its case in chief the state must prove, beyond a reasonable doubt, every essential ingredient of the crime charged, but the presumption of law being that the defendant is sane, the state is not required in its case in chief to introduce evidence to prove the sanity of the defendant, the burden being on the defendant to introduce proof sufficient to raise a reasonable doubt as to his sanity. When, however, the defendant has introduced proof sufficient to raise a reasonable doubt as to his sanity, the burden then shifts to the state, and it must then rebut such proof and establish by proof beyond a reasonable doubt the sanity of the defendant. In other words, it is not required of the state in the first place to prove the sanity of the defendant beyond a reasonable doubt, but it is only when the defendant has introduced proof sufficient to raise a reasonable doubt as to his sanity that the state is required to prove the sanity of defendant beyond a reasonable doubt.

When a witness is called as an expert witness, who has no knowledge and does not profess to testify regarding any facts connected with the case, but testifies merely as an expert in answer to hypothetical questions propounded to him, the matter of permitting him to testify as to the amount he is to receive for testifying as an expert is largely within the discretion of the

court. (*Kerfoot v. City of Chicago*, 195 Ill. 229, 63 N. E. 101; *Shaughnessy v. Holt*, 236 Ill. 485, 21 L. R. A. (n. s.) 826, 86 N. E. 256.)

Under the common law, depriving a person of or disfiguring such of his members as might render him the less able in fighting was mayhem, but was not a felony, while castration was not only mayhem, but was a felony. (4 Cooley's Blackstone, 206; Coke's Institutes, 62; 1 Wharton's Criminal Law, sec. 766.)

MR. JUSTICE SANNER delivered the opinion of the court.

On and prior to November 15, 1915, Chauncey A. Sheldon, with his wife, kept an employment office in the city of Helena. On the night of that day Sheldon encountered one T. M. Gerety in the office, seized Gerety, bound him, and deprived him of his right testicle. Sheldon claims that Gerety had been infesting the office, courting Mrs. Sheldon, taking her to shows and upon picnics; that he had been told of Gerety's borrowing money from Mrs. Sheldon and from the oldest Sheldon girl; had heard of a design by Gerety to burn the Sheldon home, and believed that Gerety was trying to induce Mrs. Sheldon to elope; that he had seen Gerety try to kiss the oldest Sheldon girl, had seen Gerety wearing Mrs. Sheldon's sweater, had seen photographs showing Gerety with his arm around Mrs. Sheldon, and had just before the operation found the two together on a bed in the room back of the office; that he had cut Gerety during and because of an irresistible impulse, or, as he put it: "When you caught a man in the way I had caught him and seen all that I had seen, I just couldn't help it." Other testimony tended to show that no illicit relations existed between Gerety and Mrs. Sheldon, and that Sheldon had not found them together at all on the night of November 15, but had sent for Gerety to come to the office, and on his arrival and at the point of a revolver compelled Gerety to submit to the operation. For this act Sheldon was accused, tried and convicted of the crime of mayhem, and he appeals from the judgment of conviction and also from an order denying his motion for new trial. The assignments argued

present: The sufficiency of the information, certain rulings excluding evidence, certain instructions given and refused, and certain remarks of the court made in the course of the trial claimed to be prejudicial.

1. The sufficiency of the information depends upon whether [1] the right testicle of a male human being is "a member of his body" within the meaning of section 8304, Revised Codes defining the crime of mayhem. We think it so obviously is that any discussion of the matter is unnecessary. The contention that it is not is based upon the claim that at common law the only members of the body within the definition of mayhem are those directly useful in fighting—such as to enable one to defend himself or to annoy his adversary. However this may be—and there is room for doubt about it (4 Blackstone, 206; 1 Wharton's Criminal Law, sec. 766)—the answer is that our statute is not so restricted. (*Kitchens v. State*, 80 Ga. 810, 7 S. E. 209; *Godfrey v. People*, 5 Hun (N. Y.), 369; *People v. Golden*, 62 Cal. 542.)

2. The rulings upon evidence complained of consist in refusing to require answers to certain questions asked Gerety on his direct examination as a witness for the appellant, and certain questions propounded the witness Dr. Brooke.

The subject matter of the questions asked Gerety was whether [2] he had borrowed money from Mrs. Sheldon, whether just before the castration he had told Sheldon of that fact, had told of improper advances made to Sheldon's daughter, and had admitted that he (Gerety) "had planned some matter with reference to insurance and a fire in connection with his home up there." It will be observed that these questions called for one fact (the borrowing) and three statements by Gerety, and they were asked upon the theory that, defendant having testified to a disordered state of mind resulting in uncontrollable impulse to do the act charged, it was proper to show a cause in fact for such a state of mind. The trial court was of the view that, the defendant having stated the existence of his impulse and the causes thereof, the accuracy of his information as one of

such causes was not material, but merely the fact that he had such information. We think this was correct; but in any case, and upon his own theory, the appellant would not be advantaged, because the questions, poorly calculated to elicit any very definite information, were unaided by any offers of proof to show the scope and value of the evidence sought, and because the defendant's own testimony tends to exclude the borrowing of money from Mrs. Sheldon and the supposed statements of Gerety just before the operation from among the causes of his uncontrollable impulse.

The questions asked the witness Dr. Brooke were offensive in [3] tone, and they came at the close of a long cross-examination in which the witness and appellant's counsel failed to agree in their medical views. These facts doubtless led the court to believe the questions were not honestly intended, and thus to sustain the objections to them. Theoretically, however, they were designed to search the *animus* of the witness. The appellant was therefore entitled to ask them and to have them answered. But we do not think the error thus committed a sufficient reason for reversal. The witness was called as a medical expert for the state to express an opinion merely, based upon asserted facts which to him were purely hypothetical; other experts, unchallenged for bias, testified to the same effect, so that similar evidence, not even remotely tainted with interest or prejudice, remained in the record. In this situation it is hard to believe that the appellant could have suffered any substantial harm from these particular rulings.

3. The assigned errors upon instructions relate to a refusal of appellant's offered instruction No. 5 and the giving of the court's instructions Nos. 12, 13 and 15. The refusal of offered [4] instruction No. 5 was entirely proper; it postulates facts not shown by the evidence; it authorizes inferences which are indefinite and misleading; and the substance of it, so far as proper to be given, was fairly covered elsewhere in the charge.

Instructions 12 and 13 do at first blush seem to impose upon [5] appellant the burden of proving his insanity. Properly

read, however, they amount to nothing more than to assert that, the law presuming every person to be sane, the burden of presenting the issue and of furnishing evidence sufficient to raise a reasonable doubt upon the subject is upon the accused person claiming insanity as a defense, which is entirely correct. (*State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169; *State v. Leakey*, 44 Mont. 354, 120 Pac. 234; *State v. Halk*, 49 Mont. 173, 141 Pac. 149.)

It is true that instruction No. 13 uses the word "guilt" instead of the word "insanity"; but in this the court is justified [6] by what was said in *State v. Crean*, 43 Mont. 47, 55, Ann. Cas. 1912C, 424, 114 Pac. 603, and we are convinced that the instruction, taken in connection with the whole charge, could not have misled the jury.

Instruction No. 15 is unexceptionable. (*State v. Peel, supra.*)

4. We have considered the remarks of the court assigned as prejudicial, but are unable to see that they command a reversal of the case.

The judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

STATE, RESPONDENT, v. WOODS ET AL., APPELLANTS.

(No. 4,026.)

(Submitted November 5, 1917. Decided November 13, 1917.)

[169 Pac. 39.]

*Criminal Law—Larceny of Livestock—Circumstantial Evidence—Venue—Corpus Delicti—Sufficiency.**Larceny of Livestock—Circumstantial Evidence—Sufficiency.*

1. Under the rule that where a conviction is sought upon circumstantial evidence, the criminatory circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis, evidence held sufficient to show the theft of certain cattle by defendants.

[As to circumstantial evidence, see notes in 62 Am. Dec. 179; 97 Am. St. Rep. 771.]

Same—Venue—Corpus Delicti—Circumstantial Evidence.

2. In cattle-stealing cases both the *corpus delicti* (the theft) and the venue may be established by circumstantial evidence.

Appeal from District Court, Fallon County; Daniel S. O'Hern, Judge.

DENVER AND OSCAR WOODS were convicted of grand larceny, and appeal from the judgments of conviction, and from an order denying their motions for new trial. Affirmed.

Messrs. Loud & Leavitt and *Mr. Joseph Hodson*, for Appellants, submitted a brief; *Mr. Wm. B. Leavitt* argued the cause orally.

Mr. S. C. Ford, Attorney General, *Mr. Frank Woody*, Assistant Attorney General, and *Messrs. Booth & Dousman*, for the State, submitted a brief; *Mr. Woody* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendants were tried jointly and convicted of the crime of grand larceny, in the district court of Fallon county. The

On necessity of proving *corpus delicti* in larceny, see notes in 68 L. R. A. 48, 54; 28 L. R. A. (n. s.) 536; L. R. A. 1916B, 846.

court pronounced separate judgments upon them, sentencing each of them to undergo a term of imprisonment in the state prison. They have appealed from the judgments and from an order denying their motion for a new trial. They challenge the integrity of the judgments upon the single ground that the verdict is contrary to the evidence: First, in that, taken as a whole, it does not disclose the commission of a larceny; and, second, that, though this be conceded, it does not disclose that the taking occurred in Fallon county.

The subject of the larceny is described in the information as three heifer and two bull calves of the Hereford breed not branded, of the value of \$175, and the property of H. W. Sparks the prosecuting witness. They are alleged to have been feloniously taken from the possession of Sparks in Fallon county on or about August 14, 1916.

Sparks resides on section 34, township 9, north of range 60 east, in Fallon county, about four and one-half miles west of the boundary line between the state of Montana and the state of North Dakota. In August, 1916, he was the owner of cattle the accustomed range of which was to the south and east of his residence toward the Dakota line. Among them were five cows with the calves described in the information, which ranged on and near section 30 in fractional township 9, north of range 61 east, also in Fallon county. The watering place to which these cows with their calves usually resorted is a reservoir on North Cannonball Creek, in the northwest quarter of the last-named section, about two and one-half miles west of the state line. The defendants reside on a ranch in North Dakota, about two and one-half miles east of the state line. They were engaged in raising cattle and horses and in taking care of cattle for others for hire. On August 20 the calves in question were found by Sparks in the possession of the defendants on a ranch about a mile east of the village of Marmath, in North Dakota. This ranch lies about fifteen miles southeast from that of defendants and about eight miles on a direct line east of the state boundary line. At that time it was owned by one D. W. Doty, who re-

sides at St. Paul, Minnesota, but was in charge of Samuel Lemming, a cousin of the defendants.

That the animals in question belonged to the prosecuting witness and that he found them in the possession of the defendants [1] on the Doty ranch are facts not in dispute. There is much conflict, however, upon the question whether they were furtively taken from their mothers while they were on the range in Fallon county and driven to the place where they were found. On these points the evidence is entirely circumstantial. It will serve no useful purpose to set forth and subject to critical analysis even those portions of it which point most directly to defendants' guilt. It is sufficient to say that the conflicts in it were resolved by the jury in favor of the truth of the state's witnesses; and that, accepting these statements as true, we think the evidence as a whole sufficient to meet the requirements of the rule that, where a conviction is sought upon circumstantial evidence, the criminatory circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis. (*State v. Allen*, 34 Mont. 403, 87 Pac. 177; *State v. Suitor*, 43 Mont. 31, Ann. Cas. 1912C, 230, 114 Pac. 112; *State v. Chevigny*, 48 Mont. 382, 138 Pac. 257.)

It is competent in this class of cases to establish the *corpus delicti* [2] that is, the theft, and the venue, both by circumstantial evidence (*State v. Keeland*, 39 Mont. 506, 104 Pac. 513), provided only it meets the requirements of the rule laid down in the cases cited *supra*. As we have said, the evidence in this case meets these requirements, and hence, we think, the conviction should be upheld.

Each of the judgments and the order are therefore affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

GARVIN, RESPONDENT, v. BUTTE ELECTRIC RY. CO.,
APPELLANT.

(No. 3,804.)

(Submitted October 5, 1917. Decided November 15, 1917.)

[169 Pac. 40.]

*Carriers—Street Railways—Carriage of Passengers—Negli-
gence—Jury Question—Instructions—Proper Refusal.*

Street Railways—Snow and Ice on Car-steps—Duty of Carrier.

1. *Held*, that it may not be laid down as a matter of law that a street-car company is never required to remove snow deposited on the steps of its cars while in transit between the termini of its road during a snowstorm, and packed thereon by passengers getting on and off, but that under the statute which places upon the carrier of passengers the duty to use the utmost care and diligence for their safe carriage, and the evidence, it was for the jury to determine whether defendant should have removed the accumulation so as to avoid injury to plaintiff by slipping while in the act of alighting.

Same—Duty of Carrier—Instruction—Proper Refusal.

2. In the absence of limitations therefrom to the effect that if the accumulation of snow and ice on the car-step had assumed a dangerous form, was caused in whole or in part by defendant's employees, or had existed for such a length of time that the company must have known of its presence and its dangerous character, the company was not excused from liability, an offered instruction that the mere fact of snow and ice accumulating on the step during a snowstorm was not such evidence of negligence as would warrant recovery, if defendant company had not a reasonable time to remove the effects of the storm, was properly refused.

Same—Duty of Carrier—Improper Instruction.

3. An offered instruction that it is the duty of a carrier of passengers to exercise a very high degree of care to clean off the steps of its cars when leaving the barn in the morning, and that it is bound to exercise ordinary care to keep the steps free from snow and ice during the day, did not meet the requirement of utmost care called for by the statute, and was properly refused.

[As to duties and liabilities of street-car companies to passengers, see note in 118 Am. St. Rep. 461.]

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

ACTION by Josephine Garvin against the Butte Electric Railway Company and another. From a judgment against defendant company it appeals. Affirmed.

On duty of carrier of passengers to keep steps of cars free from snow and ice, see notes in 15 L. R. A. (n. s.) 523; 35 L. R. A. (n. s.) 592.

STATEMENT OF THE CASE BY THE JUDGE DELIVERING THE
OPINION.

Josephine Garvin brought this action against the defendants Butte Electric Railway Company and J. R. Wharton, its general manager, on account of injuries alleged to have been received by her as the result of a fall while she was getting off of one of defendant company's street-cars in the city of Butte on January 24, 1914. At the conclusion of plaintiff's case a motion for a nonsuit was made on behalf of both defendants. It was granted as to the defendant Wharton, but denied as to the defendant corporation. At the close of all the evidence the defendant company moved the court for a directed verdict. This motion the court denied. Thereafter the jury returned a verdict in favor of plaintiff and against the defendant company for the sum of \$600. From this judgment this appeal is taken.

The negligence charged in the complaint is: "That the defendants carelessly and negligently allowed and permitted snow and ice to accumulate on the steps of the said car used by passengers in boarding and alighting from said car," and that in attempting to alight from said car "the plaintiff slipped upon the ice and snow that the defendants had carelessly and negligently allowed to accumulate upon the steps of said car, as aforesaid, and fell and struck the step of said car, thereby being severely injured as follows, to wit: * * * "

The answers denied substantially every allegation of the complaint, save the allegation of the corporate capacity of the defendant corporation, the business in which it was engaged, and that Wharton was its general manager.

From the testimony it appears that the plaintiff, Josephine Garvin, resided at 519 North Alabama Street, in Butte, Montana; that on January 24, 1914, at the corner of Broadway and Main Streets, in said city, she boarded a Walkerville car for home. It was snowing when she entered the car, and snow continued to fall during the time plaintiff was on the car. A

number of other passengers boarded the car at the same place and time with plaintiff. The car was a pay-as-you-enter side door entrance car. At Excelsior and Caledonia Streets the plaintiff left the car, and in getting off she slipped upon the snow and ice on the step of the car, sustaining injuries. The defendant company contends that it conclusively appears from the evidence that the snow upon which plaintiff slipped was tracked upon the step of the car by passengers who boarded the car immediately before or in company with the plaintiff. The plaintiff disputes this, and claims the evidence shows that the presence of the snow upon the car-step was due to three reasons: That it was tracked in by the passengers, the violence of the storm, and the act of the conductor in pushing snow from the inside of the car and on to the step before the car started out on the trip on which plaintiff was injured.

Messrs. Shelton & Furman, Mr. A. J. Verheyen and Mr. Peter Breen, for Appellant, submitted a brief; *Mr. Fred. J. Furman and Mr. Breen* argued the cause orally.

Plaintiff proved nothing more than that there was snow upon the step of the car when she undertook to leave the car. That the snow had all been tracked upon and into the car within a very few minutes prior to the accident is plain, and the evidence shows that the step was thoroughly cleaned at the time when it was lowered and the door was opened to admit passengers at the corner of Broadway and Main Streets at the beginning of the trip, and the evidence shows that it was snowing hard at the time. Under such circumstances the presence of snow upon the step does not constitute negligence on the part of the defendant corporation, and in the absence of other testimony of negligence there is no evidence sufficient to support the verdict or judgment, and a nonsuit should have been granted. (See *Meyer v. Michigan Cent. Ry. Co.*, 180 Mich. 516, 147 N. W. 485; *Palmer v. Pennsylvania Co.*, 111 N. Y. 488, 2 L. R. A. 252, 18 N. E. 859; *Meginn v. Ramsdell*, 163 App. Div.

232, 148 N. Y. Supp. 415; *Sutton v. Pennsylvania R. Co.*, 230 Pa. 523, 79 Atl. 719; *Caywood v. Seattle Elec. Co.*, 59 Wash. 566, 110 Pac. 420; *Riley v. Rhode Island Co.*, 29 R. I. 143, 17 Ann. Cas. 50, 15 L. R. A. (n. s.) 523, 69 Atl. 338; *Fearn v. West Jersey Ferry Co.*, 143 Pa. St. 122, 13 L. R. A. 366, 22 Atl. 708; *Kelly v. Manhattan Ry. Co.*, 112 N. Y. 443, 3 L. R. A. 74, 20 N. E. 383.)

Messrs. Canning & Geagan and *Mr. E. P. Kelly*, for Respondent, submitted a brief; *Mr. M. F. Canning* argued the cause orally.

The court did not err in refusing to grant defendant Butte Railway Company's motion for a nonsuit, at the conclusion of plaintiff's case, for the reason that there was at that time sufficient evidence before the court tending to show negligence on the part of the defendant for allowing the accumulation of snow and ice on the step of the car; and tending to show that the defendant had knowledge of the presence of the snow and ice on the step of the car, before it started its car on the trip on which plaintiff was injured; and that it failed to take any steps to remove the said snow and ice; and that in fact, the defendant actually contributed to and directly caused the presence of snow and ice on the step of the car by the act of its conductor in pushing out of the body of the car, and on to the step of the car, snow that interfered with the closing of the door of the car. (*Neslie v. Second & Third Sts. Passenger Ry. Co.*, 113 Pa. St. 300, 6 Atl. 72; *Gilman v. Boston & M. R. R. Co.*, 168 Mass. 454, 47 N. E. 193; *Foster v. Old Colony Street Ry. Co.*, 182 Mass. 378, 65 N. E. 795.)

In the last case above, the court cited *Fearn v. Ferry Co.*, cited by the appellant in the case at bar, but plainly showed that the rule in that case depended entirely upon the circumstances surrounding the parties at the time and place. (See, also, *Murphy v. North Jersey St. Ry. Co.*, 81 N. J. L. 706, 35 L. R. A. (n. s.) 592, 80 Atl. 331; *St. Louis Southwestern Ry. Co. v. Gresham* (Tex. Civ.), 140 S. W. 483.)

HONORABLE R. LEE WORD, a Judge of the First Judicial District, sitting in place of the Chief Justice, delivered the opinion of the court.

At the argument counsel for the appellant company stated that the only question presented on this appeal was: Is the presence of snow upon the step of a street-car evidence of negligence sufficient to justify a verdict when the snow complained of was tracked upon the steps in the midst of a snowstorm and upon the very trip on which plaintiff was injured, there being no evidence that snow was allowed to accumulate upon the step of the car between the beginning and end of the trip, except what was carried into the car and deposited on the steps of the car by the feet of the passengers, and there being affirmative evidence that the step was cleaned immediately before passengers got upon the car to make the trip on which the accident occurred? The appellant contends that, under the facts and conditions above stated, warranted, as it claims, by the evidence, no liability attached to the appellant company, and that the court erred in overruling its motion for nonsuit, for a directed verdict, and in refusing to give instructions Nos. 13 and 14 requested by appellant.

Respondent contends that the court did not err in denying the motion for a nonsuit, or for a directed verdict, or in giving the instructions requested by plaintiff, or in refusing to give those asked for by the defendant and appellant, for that there was evidence tending to show negligence on the part of the defendant company in that it allowed snow and ice to accumulate on the step of the car; tending to show that the defendant company had knowledge of the presence of the snow and ice upon the step of the car before it started the car on the trip on which plaintiff was injured, and that the defendant, through its agents, actually contributed to, and in part caused, the snow and ice to be upon the step of said car by the act of its conductor in pushing out of the body of the car and on to the step thereof snow that interfered with the closing of the door of the car.

Of the cases cited by appellant in support of its contention that, under the facts as disclosed by the evidence, no presumption of negligence against the defendant company arose because of the presence of snow and ice upon the step of the car on which plaintiff was a passenger, and that the defendant company was under no obligation to remove the snow and ice from the step of the car after plaintiff entered it and before she got off of it, the one on which it mainly relies is *Riley v. Rhode Island Co.*, 29 R. I. 143, 145, 17 Ann. Cas. 50, 15 L. R. A. (n. s.) 523, 69 Atl. 338. In the opinion of the court in that case the facts are stated as follows: "On the first day of March, 1907, the plaintiff, in descending from a street-car operated by the defendant, slipped from the step of the car and fell, and was injured. A snowstorm had commenced the night before, and, with intermissions of rain, continued during the day. The average temperature, until after the accident, was below the freezing point. It appeared in evidence that before starting upon the trip on which the accident occurred the conductor had removed from the step such snow and ice as had accumulated there, but that, after starting from the terminus of the route ice and snow had been deposited on the step by the feet of incoming passengers, and so remained in considerable mass when the plaintiff placed his foot upon it in alighting. He testifies that before stepping down he saw the snow and ice there, but used due care in descending. Upon these facts the superior court held that no negligence on the part of the defendant had been shown, and directed a verdict for the defendant." The supreme court of Rhode Island held that the verdict was rightly directed, resting its decision in the main upon the case of *Palmer v. Pennsylvania Co.*, 111 N. Y. 488, 2 L. R. A. 252, 18 N. E. 859. That court in its opinion in that case says: "The immediate and continuous removal of all snow and ice from such trains, or the covering of them with sand or ashes in such manner that no slippery places shall at any time be exposed, would be quite impracticable and beyond the duty which a railroad company owes to its passengers," and that "it is quite impossible to lay

down any general rule applicable to all circumstances, in respect to the degree of care to be observed by a railroad corporation in the removal of ice or snow from its cars, and each case must, therefore, be generally determined by its own peculiar circumstances; but it is safe to say that such corporations should not be held responsible for the dangers produced by the elements until they have assumed a dangerous form, and they have had a reasonable opportunity to remove their effects."

The plaintiff, Josephine Garvin, testified, in substance, that when she boarded the car it was snowing hard; that a blizzard was blowing; that everybody's feet were full of snow, and that there was lots of snow both in the vestibule and on the step; that someone, either the conductor or motorman, attempted to close the car door: that the door refused to close on account of the amount of snow the passengers carried in, and that the conductor pushed the door back and forth and shoved the snow out on the step; that there was a mound of snow as large as her fist that kept the door from closing; that it was piled up that high, and the door refused to close; that the conductor took hold of the door and shoved the snow out on the step with both hands; that the conductor scraped out on to the step all the snow that was carried in by these eighty people; all the snow that interfered with the door. The conductor testified that he did not pay any attention to the step on the trip out. Other witnesses called by plaintiff testified as to the snow upon the step and in the vestibule of the car.

1. Under the evidence we are of opinion that the case was one for the jury under proper instructions. It was for them to say from the evidence whether the snow and ice upon the car step had assumed a dangerous form; whether the defendant company, through its agents knew, or in the exercise of reasonable diligence should have known, of the danger and had a reasonable opportunity to remove the snow and ice from the step of its car.

Under the statutes of this state, the burden is placed upon the carrier of passengers to use the utmost care and diligence

[1] for their safe carriage. To lay down the rule that under no circumstances is a common carrier of passengers called upon to remove accumulations of snow and ice from the steps of its cars between the termini of its route would in all cases of this nature relieve such carriers of the burden as to the safety of their passengers placed upon them by the statutes. "Conditions may arise when it would be the company's duty en route to remove the ice and snow from its steps for the safety of passengers in getting on and off its cars. In such circumstances the duty of the company should be measured by the danger of the situation; and if it is apparent to a reasonably prudent person that passengers cannot get off or on the cars, exercising reasonable care, without danger of falling, the steps and platform should be put in such condition as to enable them to do so, even though the train must be delayed for that purpose." (*Haas v. St. Louis Co.*, 128 Mo. App. 79, 106 S. W. 599; *Craig v. United Rys. Co.*, 175 Mo. App. 616, 158 S. W. 390; *Neslie v. Second & Third Sts. Passenger Ry. Co.*, 113 Pa. 300, 304, 6 Atl. 72; *Dorrance v. Railway Co.*, 175 Mich. 198, Ann. Cas. 1915A, 763, 141 N. W. 697.)

In the present case it was for the jury to say whether or not, under the evidence, conditions had arisen which made it the duty of the defendant company, having due regard for the safety of its passengers, to remove the ice and snow from the step of its car after it left Main Street and before the plaintiff alighted therefrom.

Appellant urges that it was error for the court to refuse to [2] give instruction No. 13 asked by it, which reads as follows: "You are instructed that a street railway company is not bound to immediately remove all snow and ice from the steps of its cars during a snowstorm, and a passenger has no right to assume that the effects of a continuous storm of snow will be immediately and effectually removed from the steps while the car is making its passage between the termini of its route; and the mere fact that snow and ice accumulated on the steps between the time the passenger boarded the car and got off is not such evidence of negligence of the company as will permit a recovery

by the passenger for the injuries caused by slipping on the steps when getting off; and if you find that the street railway company did not have a reasonable opportunity to remove the effects of this storm from the steps of its car, then your verdict must be for the defendants."

In its language this instruction closely follows that of the court in *Riley v. Rhode Island Co., supra*. However, it is to be inferred from the opinion of the court in that case and from the statements found in the cases cited therein that no liability attached to the defendant unless the accumulation of snow and ice had assumed a dangerous form, was caused in whole or in part by the employees of the company, or existed for such a length of time that the company must have known of its existence and of its dangerous condition and had a reasonable opportunity to remove it. In the absence of these limitations and conditions from instruction No. 13, the court below, in view of the evidence, did not err in refusing it. Nor did the court err in refusing instruction No. 14 asked by the appellant, for the reason that this instruction does not correctly state the law. As noted above, the duty of using the utmost care for the safety of its passengers, at all times, rested upon the defendant [3] company. By instruction No. 14, as offered by the appellant, the jury are told that: "It is the duty of the carrier to exercise a very high degree of care to clean off the steps of its car when it leaves the barn in the morning, and that it is bound to exercise ordinary care to keep the steps free from snow and ice during the day." Such care as here indicated is not the utmost care called for by the statute.

Finding no reversible error in the record, the judgment is affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing opinion.

STOCKMEN'S NATIONAL BANK OF FORT BENTON,
APPELLANT, v. HOFELDT ET AL., DEFENDANTS; BOGY
MERCANTILE CO., RESPONDENT.

(No. 3,803.)

(Submitted October 5, 1917. Decided November 15, 1917.)

[169 Pac. 48.]

*Mortgages—Judgment Liens—Priority of Equitable Titles—
Public Lands—Attachment.*

Mortgages—Judgment Liens—Priority of Equitable Titles.

1. The lien of a judgment is a general one, and must yield to all prior equitable titles in others.

Public Lands—Attachment.

2. An attachment does not lie against the inchoate right an entryman of desert land has therein before issuance of patent.

Same—Entry not Assignable.

3. A desert land entry is not assignable to or for the benefit of a corporation or association, under the Act of Congress of March 28, 1908. (Chap. 112, sec. 2, 35 Stat. 52.)

[As to encumbrances by pre-emptors and other claimants, see note in 52 Am. St. Rep. 249.]

Appeal from District Court, Blaine County, in the Eighteenth Judicial District; John A. Matthews, Judge of the Fourteenth District, presiding.

ACTION to foreclose a mortgage by the Stockmen's National Bank of Ft. Benton, a corporation, against Herman H. Hofeldt, Edith J. Hofeldt, George W. Duffield, Emma Duffield, and the Bogy Mercantile Company, a corporation. From a judgment and decree giving preference to a lien of the Mercantile Company, the plaintiff appeals. Modified and affirmed.

Messrs. Stranahan & Stranahan, for Appellant, submitted a brief; *Mr. F. E. Stranahan* argued the cause orally.

As between Edith J. Hofeldt, mortgagor, and the plaintiff bank, mortgagee, a constructive trust arose wherein the mortgagor held the tract omitted by mistake from the description of lands in the mortgage, in trust for the mortgagee, to the extent

of the debt to secure which the mortgage was given, and the defendant Bogy Mercantile Company, by its judgment, acquired a lien subject to this trust. "Through the instrumentality of a constructive trust relief has been granted where a portion of the land intended to be conveyed was, by mistake, omitted from the deed." (15 Am. & Eng. Ency. Law, p. 1186, citing *Hensler v. Sefrin*, 19 Hun (N. Y.), 564.)

Mr. R. E. O'Keefe, for Respondent, submitted a brief.

One who files upon a desert land entry acquires a valuable right in the land embraced therein; he is the owner of the buildings and structures placed thereon, he has a right of possession, and he has such a right in the lands that he may mortgage or sell the same. (U. S. Comp. Stats. 1913, secs. 4674, 4678, 4679, 4682.) The government permits a desert land entryman to sell such entry, restricting the right of sale to such persons as are themselves qualified to enter lands under the desert land Act. (Sec. 4682, *supra*.) Mere possessory interests on public lands may, in most of the states, be sold under execution, except where their sale would interfere with the laws of the United States with regard to the disposal of those lands. (1 Freeman on Executions, sec. 175.)

The interest of a settler upon public lands in a town site laid out in pursuance to the Acts of Congress is attachable. (*Fessler v. Haas*, 19 Kan. 216.) Possessory right of a mine upon public lands is attachable. (*McLaughlin v. Kelly*, 22 Cal. 211.) Every species of property, whether real or personal, which is capable of being taken under a levy and execution is attachable. (Drake on Attachments, 6th ed., 263; 1 Am. & Eng. Ency. of Law, 1, p. 911.) All goods, chattels, moneys and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property or rights of property seized and held under attachment in the action, are liable to execution. (Rev. Codes, sec. 682; *Fish v. Fowlie*, 58 Cal. 373; *Keene v. Sallenbach*, 15 Neb. 200, 18 N. W. 75; *Brooke v. Eastman*, 17 S. D. 339, 96 N. W. 699; *Phoenix*

Min. & Mill. Co. v. Scott, 20 Wash. 48, 54 Pac. 777; *Forbes v. Gracey*, 94 U. S. 762, 24 L. Ed. 313; *McKeon v. Bisbee*, 9 Cal. 137, 70 Am. Dec. 642; *Merced Mining Co. v. Fremont*, 7 Cal. 317, 68 Am. Dec. 262; *Manuel v. Wulff*, 152 U. S. 505, 38 L. Ed. 532, 14 Sup. Ct. Rep. 651; 1 Freeman on Executions, sec. 175.)

HONORABLE R. LEE WORD, a Judge of the First Judicial District, sitting in place of the Chief Justice, delivered the opinion of the court.

Plaintiff and appellant brought this action to foreclose a number of mortgages, only one of which is material to a consideration of the questions presented on this appeal.

Prior to the tenth day of May, 1911, Edith J. Hofeldt had entered as a desert claim certain lands in Chouteau county, particularly described in the pleadings. On May 10, 1911, the defendant Bogy Mercantile Company, a corporation, commenced an action against the defendants Herman H. and Edith J. Hofeldt, in the district court of Chouteau county, and caused a writ of attachment, issued in said cause, to be levied upon said desert land entry of the defendant Edith J. Hofeldt on June 21, 1911. On October 5, 1911, judgment by default in the sum of \$2,451.88 was entered against the defendants in said action. Execution issued on said judgment. On the 9th of December, 1911, said desert entry was sold to the defendant Bogy Mercantile Company and a sheriff's certificate of sale issued therefor. Said property was not redeemed within the time allowed by law, and on December 20, 1912, the defendant Bogy Mercantile Company received a sheriff's deed for said property. This deed was never recorded. On August 19, 1911, the defendant Edith J. Hofeldt made her final proof on her desert claim. On the same day said defendant, by way of further security for her indebtedness to plaintiff theretofore existing, executed a mortgage to plaintiff which was intended to include all of said desert land entry; but, as the court found, there was omitted from said mortgage, by the mutual mistake of both parties, "lot 2, section 7, township 28 north, range 19

east." On November 16, 1911, the defendant Edith J. Hofeldt executed and delivered to plaintiff a new mortgage, covering said lot No. 2 so omitted from her said mortgage of August 19, 1911. Finding of fact No. 4 is as follows: "That said mistake was the mutual mistake of the parties, and the property described in the last-mentioned mortgage was the land embraced within the Edith J. Hofeldt desert entry." The court further found that: "As between said defendant Hofeldt and this plaintiff, said mortgage (on said lot 2) was a lien against said property, but not a valid lien against said property, as against attachment creditors, or a judgment secured in good faith on a valid existing debt against said Hofeldt, prior to November 16, 1911, the date of said correction mortgage."

The court further found that prior and up to the nineteenth day of August, 1911, the title to the lands embraced within the desert entry of said Edith J. Hofeldt was in the government of the United States, and that the attachment levied in the action of the Bogy Mercantile Company against the defendant Hofeldt was of no effect, but that the judgment of said Bogy Mercantile Company against Hofeldt of October 5, 1911, was a valid lien against said lot 2, of said section 7, and that the sheriff's deed for said land to said company was a valid deed. From a judgment and decree giving preference to the lien of the judgment of October 5, 1911, in favor of the defendant Bogy Mercantile Company as against the corrected mortgage to plaintiff of November 6, 1911, the plaintiff has appealed.

In his brief, counsel for the defendant and respondent Bogy Mercantile Company takes the position that the court below was correct in holding that the lien of the judgment of October 5, 1911, was valid as against the corrected mortgage to the appellant, executed and delivered November 16, 1911, but that the court erred in its findings and conclusions upon which said judgment rests. Counsel for respondent now contends that the trial court erroneously found that the attachment lien of the defendant Bogy Mercantile Company was without effect, for that the legal title to the lands involved was, at the time of the

attachment, in the United States. The main contention and argument of counsel for respondent is that said attachment was valid as of the date it was made; that by it, respondent obtained a lien prior to any mortgage lien of appellant upon said desert claim, and that upon this theory, and for this reason, the judgment appealed from should be upheld.

This court is of opinion that the judgment on review cannot stand. Under the facts, the court was in error in holding that the judgment which respondent obtained against the defendant Hofeldt on October 5, 1911, took precedence of the mortgage to appellant of August 19, 1911, as corrected on November 16th [1] of the same year. The lien of a judgment is a general lien and must yield to all prior equitable titles in others. (*Rockefeller v. Dellinger*, 22 Mont. 418, 74 Am. St. Rep. 613, 56 Pac. 822; Pomeroy's Equity Jurisprudence, sec. 721.) Counsel for respondent does not contend otherwise. Nor can the judgment be upheld upon the theory that the attachment levied upon the lands embraced within the desert entry created a valid lien, contrary to the express finding of the court below.

Prior to the time when the defendant Edith J. Hofeldt made full payment for the land included within her desert entry, and complied with all the preliminary acts prescribed by law for the acquisition of title thereto, she had no vested interest in the lands occupied by her. Until she made final proof, she had but an inchoate right which would ripen into a complete equitable title when she had paid the full purchase price therefor, and had performed all the conditions requisite to entitle her to a patent. Up to the time when her right to a patent became a vested right, the power of disposing of said lands was in the United States, and this right could not be limited by any action or proceeding of third parties.

No case has been cited holding that an attachment lies against [2] an inchoate right of an occupant of public lands. By way of analogy, attention is directed to the fact that the laws of this state, with reference to the taxation of property, are broad and comprehensive. As to them, this court has held that

before public land in the possession of an occupant thereof "can be taxed by the state as the property of the beneficial owner, a perfect equitable title must be vested, and the consideration fully paid to the United States." (*Johnson v. County of Lincoln*, 50 Mont. 253, 146 Pac. 471.)

If the defendant Bogy Mercantile Company can be said to [3] be an assignee of the defendant Edith J. Hofeldt, it must be an assignee by operation of law. But this cannot be, for the Act of Congress of March 28, 1908 (U. S. Comp. Stats. 1916, sec. 4682), concerning desert lands, provides that "no assignment of an entry" thereof made "to or for the benefit of any corporation or association shall be authorized or recognized."

Our conclusion is that neither by the attachment of June 21, 1911, nor by the judgment of October 5, 1911, did the defendant Bogy Mercantile Company acquire any rights in or to the desert entry of the defendant Edith J. Hofeldt prior or superior to the lien of the mortgage of the plaintiff thereon.

This cause is remanded to the district court, with directions to modify the judgment herein, so as to establish the priority of plaintiff's mortgage on lot 2 of section 7, in township 28 north, range 19 east, in Blaine county, Montana, over any interest or claim of the defendant Bogy Mercantile Company to said land; to include said lot 2 in the order of foreclosure, and direct foreclosure of the mortgage on said lot 2, together with the other lands mentioned in said judgment, and when so modified, the judgment will stand affirmed. The plaintiff and appellant will recover its costs of this appeal as against the defendant Bogy Mercantile Company.

Remanded with directions.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decisions.

STATE, RESPONDENT, v. FISHER ET AL., APPELLANTS.

(No. 4,070.)

(Submitted November 7, 1917. Decided November 19, 1917.)

[169 Pac. 282.]

*Criminal Law—Murder in First Degree—Evidence—Motion to Strike—Cross-examination—Harmless Error—Instructions.**Homicide—Evidence—Cross-examination—Harmless Error.*

1. Error in refusing to compel a physician to answer a question on cross-examination, after testifying on direct that deceased had come to his death by septicemia due to a gunshot wound, whether he knew that the victim of the homicide was suffering from acute or chronic nephritis, was rendered harmless by the failure of counsel to pursue the inquiry further.

[As to fact that death resulted from supervening cause as defense to charge of homicide, see note in Ann. Cas. 1916C, 692.]

Same—Trial—Evidence—Motion to Strike—When Too Late.

2. Motion to strike testimony admitted without objection comes too late.

Same—Defendants' Conduct and Declarations—Admissibility.

3. Evidence of defendants' declarations and conduct at the time they were identified by a witness as the men whom he saw running from the scene of the crime was admissible.

Same—Cross-examination—Harmless Error.

4. Though error was committed in refusing a police officer to state on cross-examination whether at the time defendants were identified by decedent at the hospital within a day or two prior to his death he seemed to be under the influence of a drug, the error was insufficient to work a reversal of the judgment where counsel made no effort thereafter to show the condition of decedent at that time.

Same—Instructions—Proper Refusal.

5. Where defendants, charged with homicide, were either guilty of murder in the first degree or innocent, instructions upon murder in the second degree and upon manslaughter were properly refused.

Appeal from District Court, Silver Bow County; J. V. Dwyer, Judge.

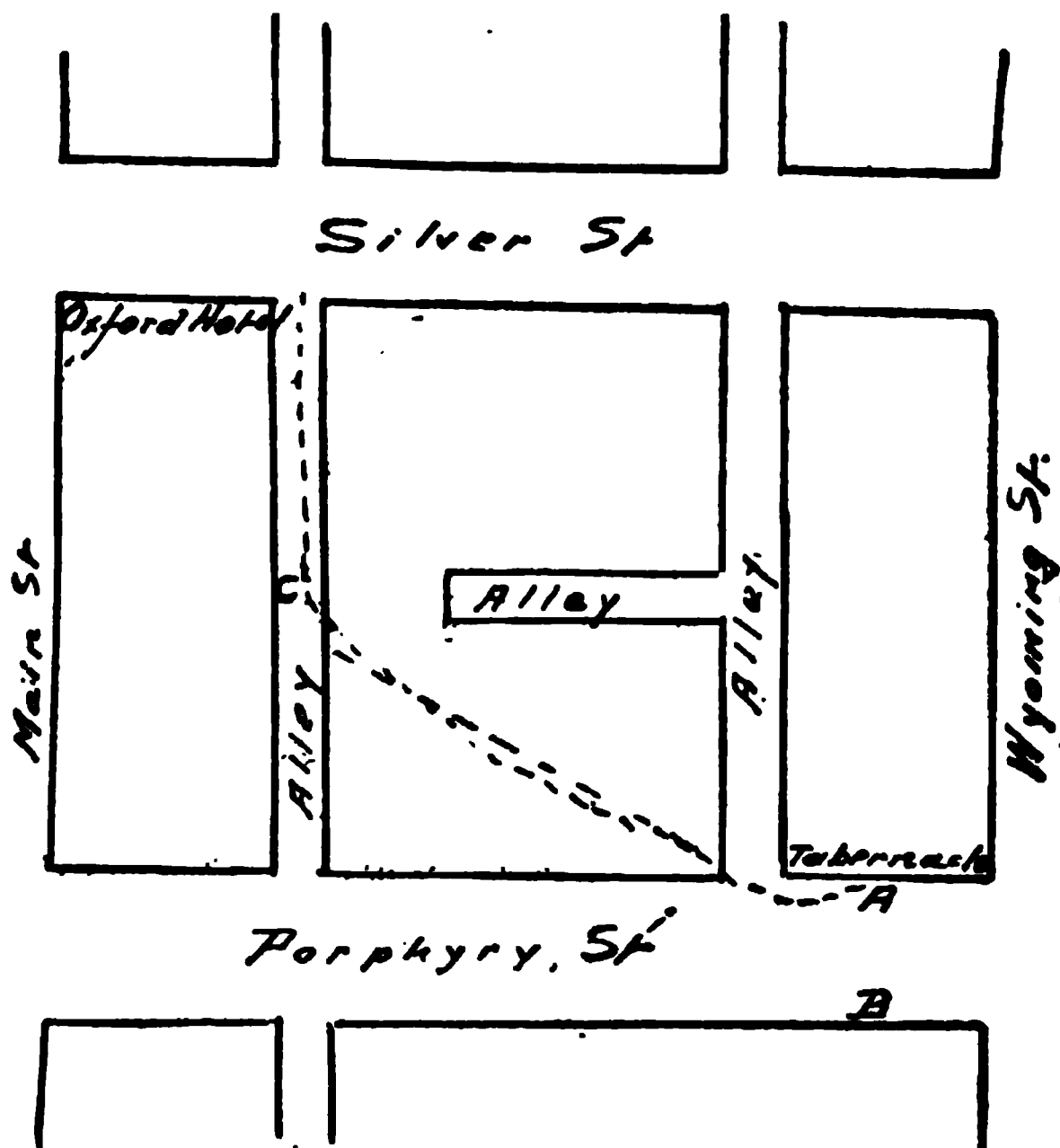
FRANK FISHER and JOHN O'NEILL convicted of murder in the first degree, appeal from the judgment of conviction and an order denying their motions for a new trial. Affirmed.

Mr. S. C. Ford, Attorney General, and Mr. Frank Woody, Assistant Attorney General, submitted a brief; Mr. N. A. Rotering, Assistant County Attorney for Silver Bow County, argued the cause orally.

Mr. D. J. McGrath, Mr. Alex. Levinski, Mr. C. K. Tuohy and Mr. John A. Groeneveld, for Appellants, submitted a brief; Mr. Groeneveld argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Some time between 7 and 9 o'clock in the evening of September 3, 1913, two men—one tall and one short—were observed by a Mrs. Henry Stone near the old Tabernacle, at the corner of Wyoming and Porphyry Streets, in the city of Butte, engaged in a "hold-up," in the course of which Thomas Higgins was shot. The two men ran away, crossing the vacant lot which lay west of the Tabernacle, to the alley which passes the rear of the Oxford Hotel. The scene is sketched below. Point A shows approximately where the shooting occurred; point B, Mrs. Stone's place of observation, and the dotted line from point A, the line of flight as indicated by her.



At about the point C were two men, the witnesses Davis and Giles; Davis heard the shooting, and Giles saw it; within a

very few minutes both noticed two men—one tall, one short—come rapidly from the direction of the Tabernacle into the alley and pass on toward Silver Street; one of them (the short man) told Giles “to run down there and see how bad this man was shot”; upon the trial, Giles claimed to be uncertain whether the appellants were the two men he had thus seen, but his testimony leaves the indelible impression that they were. Giles went down to the Tabernacle, found Higgins and remained there until Higgins was removed to the emergency hospital shortly afterward. Some time about 11 o’clock the appellants Fisher (who is tall) and O’Neill (who is short) were arrested and searched; but no weapons were found upon either. On the following day Fisher and O’Neill were taken before Higgins who identified O’Neill as the man who had shot him, but was not sure about Fisher. O’Neill responded: “Brother, look here; this is a very serious proposition; be careful, you know, and be sure”; Higgins rejoined: “I am quite sure; it was either you or your ghost.” The appellants were also taken to the office of the county attorney and there pronounced by Giles to be the men he saw run up the alley right after the shooting, whereupon Fisher exclaimed: “That son-of-a-bitch of a nigger; but for him they wouldn’t have hardly any evidence against me at all. If I ever get out of this trouble I will kill Jerry Murphy” (the chief of police). Toward the last of September the appellants, pursuant to a promise made them by the officers, were again taken before Higgins in the St. James Hospital; Higgins had been told that the officers did not wish the appellants inculpated unless they were the guilty parties, yet upon their presentation Higgins said to O’Neill, “You are the man that laid me here in bed; you are the man that shot me, I am positive of that,” to which O’Neill answered: “This is a very serious proposition; be careful. Are you sure I am the man?” and Higgins rejoined: “You are the man.” Within a day or two thereafter Higgins died, the cause of his death being septicemia due to the gunshot wound received on the night of September 3.

The foregoing, which constitutes an outline of the state's case, the appellants endeavored to meet by their testimony alone; and the effect of their testimony is to deny presence at or complicity in the shooting, and to dispute the evidence of their identification out of court by Higgins and Giles. Many of their statements touching their whereabouts at the time of the homicide should, if true, have been susceptible of corroboration; but none was offered. In some respects their testimony did not agree with their previous statements to the county attorney, or with the facts, if the state's witnesses are believed. What their demeanor on the stand was we, of course, are unable to say. One serious contribution, however, they did make to the case, *viz.*: Both testified that on September 3 they were continuously together from about 4 o'clock in the afternoon until their arrest at about 11 o'clock that night.

On the whole evidence the jury found both the appellants guilty of murder in the first degree, leaving the punishment to be fixed by the court. They were adjudged to pay the extreme penalty, and from the judgment as well as from an order denying their motions for new trial, these appeals are taken. Thirty-five alleged errors are assigned, many of which are obviously without merit. Those which suggest matters of any consequence follow:

1. Dr. C. A. Johnson was called as a witness for the state and [1] testified the cause of Higgins' death to be as stated above; on cross-examination he was asked: "Do you know that this man was suffering from acute nephritis or chronic nephritis?" An objection to the question as "immaterial, no defense to this action, and not cross-examination" was sustained, and the inquiry was not pursued further. Johnson had made no statement about nephritis, and counsel now say that "what his answer would have been is problematical"; they insist, however, that the ruling was erroneous because it excluded an inquiry into the true cause of Higgins' death. From the latter point of view the question was not open to the objections made; but since the purpose was not clear, the matter was not pursued

any further, the answer was problematical, and the appellants made no effort in their defense in dispute the cause of death, we cannot see that any substantial injury was done them by the ruling.

2. By motion to strike the testimony of the witness Malloy and by objections to questions asked the witness Prlja, the appellants endeavored to exclude the confrontation of them by Giles in the county attorney's office; particularly was it sought to exclude the declarations and conduct of the appellants at the time, and failure in that behalf is the basis of vigorous [2] complaint. The complaint is without merit. Malloy's testimony went in without objection, no notice being taken of it until the close when the motion to strike the whole was made; it was then too late. (*Poindexter & Orr Livestock Co. v. Oregon Short Line Ry. Co.*, 33 Mont. 338, 341, 83 Pac. 886.) Passing that, however, the evidence of both Malloy and Prlja was clearly admissible. (Rev. Codes, sec. 7887, subd. 3; *State v. Pepo*, 23 Mont. 473, 480, 59 Pac. 721; *State v. Lucey*, 24 Mont. 295, 302, 61 Pac. 994; *State v. Willette*, 46 Mont. 326, 331, 127 Pac. 1013; *People v. Byrne*, 160 Cal. 217, 116 Pac. 521, 529.)

3. So, too, and upon the same authority, there was no error in receiving the evidence touching the identification by [3] Higgins at the St. James Hospital. Counsel insist here and objected below upon the ground that no foundation had been laid for this, considered as a dying declaration. Whether this was correct we need not decide, because the evidence was admissible as showing the conduct and declarations of Higgins within the observation of the accused, and their conduct in relation thereto—all touching a matter vital to the issues in this case.

4. The policeman, Prlja, having testified to the occurrence [4] at St. James Hospital, appellants' counsel sought to ascertain on cross-examination whether Higgins at the time seemed to be under the influence of some drug. This was not permitted, and was error, but we cannot hold it sufficient to warrant reversal. Here again the answer was "problematical"; the

appellants had ample opportunity thereafter to show by this witness, by others claimed to be present at the same time, and by the nurse's chart—the best evidence upon the subject—what the condition of Higgins was; they did not choose to avail themselves of that opportunity or to raise the question in any form as a substantive fact in the case.

5. The most vigorous contention in the briefs relates to the [5] refusal of the court to instruct upon murder in the second degree and upon manslaughter. But there is really nothing in it. The defense was that the appellants were not present and had no part in the shooting. Either this was true or it was untrue. If it was true, the appellants are innocent. If it was untrue, the appellants are guilty of murder in the first degree. There was no middle ground. In such a situation the court need not, and should not, give instructions which would authorize a verdict meaningless from any logical point of view. (*State v. Calder*, 23 Mont. 504, 59 Pac. 903; *State v. McDonald*, 51 Mont. 1, 149 Pac. 279.)

6. Complaint is also made of the refusal of certain other instructions, but we find that the substance of them, so far as proper to be given, was fully covered by the charge.

7. Discussing the refusal to grant a new trial, appellants insist that the evidence is utterly insufficient to justify the verdict, and particularly to justify the imposition of the extreme penalty. With the penalty we have nothing whatever to do, so long as it complied with the statute prescribing punishment for the crime of which the appellants stand convicted. It may be that, considering the possibility of error in all human testimony, one could wish to avoid the infliction of death; but there cannot be the slightest doubt that as a matter of law the evidence was sufficient to justify the verdict, to establish that Higgins was fatally shot by O'Neill while O'Neill and his companion were engaged in the perpetration, or attempt to perpetrate, a robbery. Since both O'Neill and Fisher admit and insist that Fisher was with O'Neill at the hour the homicide

occurred, Fisher must have been the companion of O'Neill in the affair and is likewise guilty.

The judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied December 15, 1917.

STATE, RESPONDENT, v. POWELL, APPELLANT.

(No. 4,084.)

(Submitted November 6, 1917. Decided November 19, 1917.)

[169 Pac. 46.]

Criminal Law—Homicide—Justification—Instructions—Refusal of Evidence—Harmless Error.

Trial—Refusal of Evidence—When Harmless Error.

1. Error in excluding a question when first asked a witness was rendered harmless upon his recall when the question was repeated and then fully answered.

Homicide—Reasonable Doubt—Instruction—Proper Refusal.

2. The court having charged the jury in a prosecution for homicide that the state must prove beyond a reasonable doubt every material fact necessary to make out the crime charged, refusal of an instruction of the same rule in a negative form or in one applying it to an isolated fact was not error.

Same—Instruction—Inapplicability to Evidence—Proper Refusal.

3. Where, after decedent had withdrawn from a quarrel with defendant, the latter armed himself with a knife and about an hour later stabbed the former while asleep in bed, an instruction that the burden of proving that defendant was the aggressor was inapplicable and properly refused.

[As to self-defense plea as available to person charged with killing peacemaker, see note in *Ann. Cas.* 1913C, 265.]

Same—Defense Made Out by State—Effect.

4. Where the proof of the prosecution—i. e., the effect of all the evidence introduced by it—makes out the defense upon which one charged with crime relies, by raising a reasonable doubt of his guilt, defendant

On applicability of rule of reasonable doubt to self-defense in homicide, see notes in 19 L. R. A. (n. s.) 483; 31 L. R. A. (n. s.) 1166.

may, under section 9282, Revised Codes, avail himself of such defense without proof on his part.

Same—Justification—Improper Instruction.

5. An instruction which would have warranted the conclusion that if the state had offered any single item of evidence tending to show that defendant was justified in killing deceased, his acquittal should follow under his plea of justification, was properly refused. (Rev. Codes, sec. 9282.)

Same—Inadequate Instructions—Request for Amplification Necessary.

6. Failure to offer an instruction amplifying one given by the court in the language of a section of the Codes, precludes defendant from complaining of the one given, unless the language used is inherently erroneous.

Appeal from District Court, Silver Bow County; John V. Dwyer, Judge.

SHERMAN A. POWELL was convicted of murder in the first degree, and, from the judgment and an order denying new trial, he appeals. Affirmed.

Messrs. Edward F. and James B. O'Flynn, for Appellant, submitted a brief; *Mr. Edward F. O'Flynn* argued the cause orally.

Mr. S. C. Ford, Attorney General, *Mr. Frank Woody*, Assistant Attorney General, and *Mr. Joseph R. Jackson*, *Mr. Frank L. Riley* and *Mr. N. A. Rotering*, for the State, submitted a brief; *Mr. Rotering* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Sherman A. Powell was convicted of murder in the first degree, and appeals from the judgment and from an order denying him a new trial.

1. The court sustained an objection to a question asked the [1] witness Yammer, but later the witness was recalled, the question repeated, and then answered fully. No prejudice resulted from the first ruling, even if it was erroneous, which we do not concede. (*State v. Tudor*, 47 Mont. 185, 131 Pac. 632; *State v. Booth*, 46 Mont. 334, 127 Pac. 1017.)

2. Error is predicated upon the refusal of the court to give defendant's requested instructions 1 and 2, as follows:

"(1) You are instructed that the burden of proving beyond a reasonable doubt the fact that the defendant was at fault in the first instance in bringing on or provoking the difficulty, or in other words, that he was the aggressor in the case, rests upon the prosecution, and not upon the accused person.

"(2) You are instructed that, if any proof offered by the state tends to show that the defendant was excused or justified in killing J. H. Montgomery, then you should acquit the defendant."

Of course, the burden is never upon the accused to prove any [2] fact beyond a reasonable doubt, much less to prove that he himself was the aggressor; but, the court having told the jury that the state must prove beyond a reasonable doubt every material fact necessary to make out the crime charged, it was not necessary to repeat the same rule in the negative form, or apply it to one isolated fact.

The first portion of instruction 1 is not a correct statement of the law, and is not applicable to the facts of this case. In [3] some instances it may become a material inquiry to determine who was the aggressor in the first instance, but it is not always so. The evidence discloses that deceased and defendant, employees of the Great Northern Railway Company, became engaged in a quarrel over a game of cards; that the quarrel subsided and deceased unrobed and went to bed in a parlor-car; that defendant left his presence, went to the kitchen of a dining-car adjoining the parlor-car, secured a butcher-knife, and about an hour later returned to where deceased was in bed and stabbed him with the knife. It is wholly immaterial who was at fault in the first instance, if the deceased withdrew from the quarrel and defendant then formed the deliberate purpose to kill, armed himself, and carried his intention into execution. Defendant's version is that he armed himself for defense only, that he returned to get his coat from the car where deceased was sleeping, that deceased attempted to shoot him, and that he

struck with the knife in necessary self-defense. If this story had been accepted by the jury, a different verdict would have been commanded; but in the light of all the surrounding facts and circumstances the jury were at liberty to discredit his testimony, which they must have done.

Instruction 1 is quoted from an opinion in *Lawson v. State*, 171 Ind. 431, 84 N. E. 974, but does not include the context which makes the observation of the court pertinent to the facts of that particular case.

3. The meaning of instruction 2 is not very clear. The word [4, 5] "proof" is evidently used as synonymous with "evidence," and, so employed, the error is apparent at a glance. Assume that one witness for the state testifies to facts which tend to mitigate, justify or excuse, while all the other evidence tends to the contrary conclusion, the defendant is not entitled to his discharge because of this fact, but it still remains for the jury to say whether, upon the whole case made, the state has established the defendant's guilt beyond a reasonable doubt. The use of the word "any" before the word "proof" destroys the sense, if the instruction was intended to convey the idea expressed in section 9282, Revised Codes. In that section the word "proof" is used to designate the effect of all the evidence produced by the prosecution.

In order to avail himself of any affirmative defense, such as self-defense, after proof has been made that homicide was committed by the defendant, the statute imposes upon him the burden of furnishing sufficient evidence to raise a reasonable doubt of his guilt. (*State v. Leakey*, 44 Mont. 354, 120 Pac. 234.) If the effect of the evidence offered by the state is to show, or tend to show, mitigation, justification, or excuse—in other words, if the state makes out the defense for him by raising a reasonable doubt of his guilt—the defendant may avail himself of his affirmative defense without proof on his part. This is the meaning of section 9282 above, and this analysis is sufficient to disclose the error in the offered instruction.

The court gave in one instruction the text of section 9282, [6] and further informed the jury, in the language of section 8303, Revised Codes, that: "The homicide appearing to be justifiable or excusable, the person charged must upon his trial, be fully acquitted and discharged." If the defendant desired that these provisions be amplified by a further statement defining accurately the *quantum* of proof required as indicated by this court in numerous decisions (*State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169; *State v. Felker*, 27 Mont. 451, 71 Pac. 668; *State v. Crcan*, 43 Mont. 47, Ann. Cas. 1912C, 424, 114 Pac. 603), it was incumbent upon him to tender an instruction stating the rule. (*State v. Gordon*, 35 Mont. 458, 90 Pac. 173; *State v. Tracey*, 35 Mont. 552, 90 Pac. 791.) By his failure to offer such an instruction he is precluded now from complaining of the instructions which follow the language of the statute and are not inherently erroneous.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

Rehearing denied December 17, 1917.

O'BRIEN, APPELLANT, v. STROMME ET AL., RESPONDENTS.

(No. 3,820.)

(Submitted November 9, 1917. Decided November 20, 1917.)

[169 Pac. 36.]

County Officers—Negligence — Evidence — Insufficiency — Nonsuit.

1. Where substantially all the evidence offered by plaintiff in an action against a county board of health for negligence in looking after his welfare while a patient in the county pesthouse was excluded upon objections the rulings upon which were not questioned, leaving no evidence to show negligence or injury due to negligence on the part of the board, a judgment for nonsuit was proper.

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

ACTION by Peter O'Brien against Gus Stromme and others, as members of the county board of health. Judgment of nonsuit and plaintiff appeals. Affirmed.

Mr. Frank C. Walker and *Mr. Louis E. Haven*, for Appellant, submitted a brief.

Where a duty which is purely ministerial is violated or negligently performed by a public officer, the party injured thereby may have redress by action. (*Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463, 53 Am. Dec. 316; *State v. Ruth*, 9 S. D. 84, 68 N. W. 189; *Brown v. Lester*, 13 Smedes & M. (21 Miss.) 392; *Bennet v. Whitney*, 94 N. Y. 302; *Vose v. Reed*, 54 N. Y. 657.) The board of health and the health officer were acting as ministerial officers in this matter. (*McCord v. High*, 24 Iowa, 336; *Wilson v. Marsh*, 34 Vt. 352; *Beers v. Board of Health*, 35 La. Ann. 1132, 48 Am. Rep. 256; *Brown v. Murdock*, 140 Mass. 314, 3 N. E. 208.)

That the officer in question is one who acts judicially or quasi-judicially is not conclusive, for such officers may be and are frequently called upon to perform ministerial acts, and as to such acts, they are governed by the same rules which control ministerial action in other cases. (Mechem on Public Officers, 444; *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65; *Thompson v. Holt*, 52 Ala. 491; *People v. Provines*, 34 Cal. 520; *People v. Bush*, 40 Cal. 344; *McCord v. High*, 24 Iowa, 336.)

Messrs. Kremer, Sanders & Kremer and *Mr. J. V. Dwyer*, for Respondents, submitted a brief; *Mr. Louis P. Sanders* argued the cause orally.

The respondents, acting as the county board of health, in so far as any question involved herein is concerned, were not acting in any ministerial capacity, but clearly in a quasi-judicial capacity (*Garff v. Smith*, 31 Utah, 102, 120 Am. St. Rep. 924, 86

Pac. 772; *Smith v. Zimmer*, 45 Mont. 282, 125 Pac. 420), and could not be held responsible, unless they acted intentionally, willfully and corruptly. (*Fath v. Koepfel*, 72 Wis. 289, 7 Am. St. Rep. 867, 39 N. W. 539; *Spalding v. Vilas*, 161 U. S. 483, 40 L. Ed. 780, 16 Sup. Ct. Rep. 631; *Chamberlain v. Clayton*, 56 Iowa, 331, 41 Am. Rep. 101, 9 N. W. 237; *Bailey v. Berkey*, 81 Fed. 737; *Ballerino v. Mason*, 83 Cal. 447, 23 Pac. 530; *State v. Thomas*, 88 Tenn. 491, 12 S. W. 1034; *Kendall v. Stokes*, 3 How. (44 U. S.) 87, 11 L. Ed. 506; *Daniels v. Hathaway*, 65 Vt. 247, 21 L. R. A. 377, 26 Atl. 970; 23 Am. & Eng. Ency. of Law, 2d ed., 375; 29 Cyc. 1444; 5 Thompson on Negligence, secs. 5785, 5826.)

In the case of *Rohn v. Osmun*, 143 Mich. 68, 5 L. R. A. (n. s.) 635, 106 N. W. 697, a health board possessing discretionary powers as to the care of patients having contagious diseases and the furnishing of nurses was sued for damages. It was held that no recovery could be had. (See, also, *Allison v. Cash*, 143 Ky. 679, 137 S. W. 245; *Kirk v. Board of Health*, 83 S. C. 372, 23 L. R. A. (n. s.) 1188, 65 S. E. 387; *Beeks v. Dickinson County*, 131 Iowa, 244, 9 Ann. Cas. 812, 6 L. R. A. (n. s.) 831, 108 N. W. 311; *Valentine v. City of Englewood*, 76 N. J. L. 509, 16 Ann. Cas. 731, 19 L. R. A. (n. s.) 262, 71 Atl. 344; Dillon on Municipal Corporations, sec. 277.)

MR. JUSTICE SANNER delivered the opinion of the court.

The complaint alleges that the appellant, being afflicted with smallpox, was taken to the pesthouse maintained at or near Butte for the accommodation of such cases by the Silver Bow county board of health; that while in delirium from the disease and because of the board's failure to provide sufficient guards, he escaped on a very cold winter's night and so froze his feet that amputation of several toes became necessary, and for which he claims damages. He was nonsuited at the trial and seeks by these appeals to present the question whether the members of the board are liable.

Conceding that if, in arranging to care for matters of this kind, the board acts judicially or *quasi-judicially*, no liability for [1] mere mistakes of judgment would exist, appellant insists that the respondents are liable upon the theory that the duties of the board in the premises are ministerial, and for negligent nonfeasance or misfeasance the members must answer to whomsoever is injured thereby. Whether this be correct we may not here decide because the record does not show negligence or any injury due to negligence. It is true that practically all the evidence offered by the appellant for that purpose was excluded upon objection—why, we do not entirely understand; but since no question is made of the correctness of these rulings, we may not import into the record what the appellant did not prove. No more than anyone else can public officers be held to respond for injuries until it is shown that their fault is the proximate cause of such injuries.

The judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

BARRY, APPELLANT, v. BADGER ET AL., RESPONDENTS.

(No. 3,817.)

(Submitted November 7, 1917. Decided November 21, 1917.)

[169 Pac. 34.]

Master and Servant—Personal Injuries—Mine Accident—Negligence—Insufficiency of Evidence—Appeal and Error—Non-suit—Correct Result—Wrong Reason—Review.

Master and Servant—Mine Accident—Complaint—Evidence.

1. In a personal injury action by employee against employer, the plaintiff, to be successful, must allege and prove (1) that defendant was

On liability of master for dangerous condition of earth and rock left after blasting, see note in 48 L. R. A. (n. s.) 925.

On applicability of *res ipsa loquitur* in case of injury to servant by fall of object, see note in L. R. A. 1917E, 201.

under a legal duty to protect him from the injury complained of; (2) that he failed to perform this duty; and (3) that the injury was proximately caused by defendant's delinquency; failure to show by direct or circumstantial evidence, the presence of any one of these elements constituting the cause of action, is fatal to plaintiff's case.

Same—Evidence—Insufficiency.

2. *Held*, in an action by a quartz miner to recover damages from his employer for injuries due to a fall of rock, that the evidence went no further than to show that plaintiff was in the employ of defendant and that he was injured by the fall, and was therefore under the rule *supra*, insufficient to fasten liability upon defendant because not showing any culpable omission on the part of the latter.

Same—Employer not Insurer—*Res Ipsa Loquitur*.

3. The employer is not an insurer of the safety of the employee, nor does the happening of the accident by which the latter is injured during the course of his employment, standing alone, furnish the basis for an inference of culpable negligence on the part of the former, except in cases where the maxim *res ipsa loquitur* applies.

[As to duty of master to servant, see note in 75 Am. St. Rep. 591.]

Appeal and Error—Nonsuit—Correct Result—Wrong Reason.

4. Where a nonsuit was properly granted, though upon an erroneous reason, the action of the trial court will nevertheless be affirmed.

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

ACTION by E. J. Barry against W. W. Badger, Robert F. Turnbull and others, copartners doing business under the firm name of Gold Reef Lease. From an order of nonsuit and denial of a new trial, plaintiff appeals. Affirmed.

Mr. John A. Coleman, for Appellant, submitted a brief; *Mr. M. M. Holzman*, of Counsel, argued the cause orally.

Mr. Jesse B. Roote and *Mr. H. C. Hopkins*, for Respondents, submitted a brief.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

In this action plaintiff seeks to recover damages for a personal injury, alleged to have been caused by the negligence of the defendants during the course of his employment by them as a miner. The defendants were copartners, under the firm name of the "Gold Reef Lease." They were engaged in the business of leasing and operating quartz mines in Fergus county, their

principal place of business being at Lewistown. In the year 1913 they held under lease and were operating the MacGinniss mine at Maiden. The plaintiff was employed by them as a miner. It is alleged in the complaint that the defendants failed and neglected to exercise ordinary care and diligence to provide the plaintiff with a reasonably safe place in which to work, whereby he sustained the injury complained of. The answer of the defendants consists of a general denial of the negligence alleged, and allegations of the defenses of assumption of risk and contributory negligence on the part of the plaintiff. The cause was tried in November, 1914. At the close of the evidence, the court granted defendants' motion for nonsuit, the grounds thereof being: (1) That the evidence failed to show that the defendants did not use ordinary care to provide the plaintiff with a reasonably safe place in which to work; (2) that the injury was due to one of the ordinary hazards of the employment assumed by the plaintiff when he entered the employ of defendants; and (3) that it appeared that the plaintiff was guilty of contributory negligence. The plaintiff has appealed from an order denying his motion for a new trial.

About thirty days prior to January 23, 1913, the plaintiff, in company with W. G. Allen, also employed by defendants as a miner, was assigned work in a stope in defendants' mine from which most of the ore had theretofore been removed. It was a large excavation, extending along the vein from west to east about twenty-eight feet. It was forty or fifty feet in height and about twenty feet in width from north to south at the widest portion of it. The north wall was in a porphyry formation. The south wall was in hard limestone. Ore was exposed in a vein in the north wall, down near the floor. In order to reach the ore in this vein it was necessary to clean up and remove from the floor a large amount of debris. The evidence does not disclose whether this debris consisted of ore or was merely waste which had been left there during the previous mining operations. Nor does it show whether it had resulted from blasting, or had fallen from above because of a process of slacking in the roof

or walls. A raise had been constructed from a tunnel in the lower workings up into this stope, coming through the floor near the foot of the wall on the south. This had been made use of as a chute in order to remove the ore and waste during mining operations in the stope. The floor sloped upward from the west toward the east. The face of the north wall was substantially perpendicular and comparatively smooth; the south wall was rough and uneven, and inclined from a perpendicular to the south. About twenty feet from the floor was an "overhang" extending horizontally along the face of this wall, which was referred to by the witnesses as a "bench." At a point several feet east of the mouth of the chute it projected out from the general surface of the wall to a distance of three or four feet. At this point it was supported by stulls. So far as the evidence discloses, there were no other supporting timbers in any part of the stope. Three or four days before that on which the accident occurred, plaintiff and Allen had finished removing the loose material and had begun to drive excavations into the exposed vein. They first began work together at a point opposite the chute. When the work had progressed somewhat they began to work separately, the plaintiff drifting along the vein toward the west and Allen toward the east. The morning was usually employed by them in cleaning up and removing the ore which they had blasted down during the previous afternoon. On the day of the accident they had cleaned up the result of the blasting on the day before and each was engaged in drilling a set of holes for blasting when they quit work for the day. The plaintiff was sitting on a box engaged in drilling, when a large boulder fell from somewhere above the projection or bench in the south wall. It first struck the bench, bounded off across the stope to the north wall, then dropped to the floor, and, rolling down the incline, caught the plaintiff and inflicted the injury of which he complains.

Aside from that showing the occurrence of the fall of the rock, no evidence was introduced tending to show whether the walls, or either of them, or the roof, should, in the exercise of

ordinary care, have been supported by timbers, or whether the stulls supporting the bench were not all the timbers required in any part of the stope. The plaintiff testified substantially as follows: That he had had twenty-five years' experience as a miner; that when he first entered the stope he looked it over as best he could without making a careful inspection of it; that the lime formation found in the mines of Fergus county was hard and solid, and, in places where he had worked, a few stulls here and there were usually all that were required in the way of timbering; that he had worked in stopes where no timbering was necessary because the lime was strong enough to stand without support; that such places were considered safe; and that there was nothing in this stope apparently different from others, nor anything unusual showing that it needed timbering. Allen was also an experienced miner. He had been employed in this kind of work for ten years. He testified that, when he and plaintiff began the work of removing the loose material, he called the attention of the defendant Young, who was superintending the mining operations of defendants, to some loose rock in the wall above the bench; that under Young's direction he took a crowbar and pried out and took down all that he thought was necessary—everything he thought dangerous—and that, back of what he took out, the wall appeared to be solid so that it would stand of itself. On cross-examination he made substantially the same statements, adding that when he took out the loose rock plaintiff was below in the stope and stood out of the way while he was engaged in doing it. These were the only witnesses who testified touching the condition of the walls of the stope and the nature of the ground. They made no statement to the effect that it was of such a character that it would slack and fall by reason of exposure to the air, or that a fall would likely be caused by blasting operations in the north wall as the work progressed. Neither expressed an opinion on this subject.

“It is elementary that, when the plaintiff seeks recovery for [1] actionable negligence, his complaint must allege facts showing these three elements: (1) That the defendant was under a

legal duty to protect him from the injury of which he complains; (2) that the defendant failed to perform this duty; and (3) that the injury was proximately caused by defendant's delinquency. All of these elements combined constitute the cause of action; and if the complaint fails to disclose, directly or by fair inference from the facts alleged, the presence of all of them, it is insufficient, for it fails to state the facts constituting a cause of action." (*Ellinghouse v. Ajax Live Stock Co.*, 51 Mont. 275, L. R. A. 1916D, 836, 152 Pac. 481.)

It is equally elementary that the proof must correspond with the allegations, and that, unless it establishes them in their general scope and meaning, the cause of action is not made out. It is true the evidence may be either direct or circumstantial, but in any event it must be sufficient to show *prima facie* that in fact all the elements constituting the cause of action were [2] present. The evidence in this record falls far short of this, in that it fails to show that the defendants omitted any precaution that ordinary care and diligence would have suggested as necessary to render the stope reasonably safe for the plaintiff while engaged in doing the work assigned him. It goes no further than to establish the fact that the plaintiff was in the employ of the defendants and that he was injured by the fall of rock.

The master is not an insurer of the safety of the employee; [3] neither does the happening of an accident by which the employee is injured during the course of his employment, standing alone, furnish the basis for an inference of culpable negligence on the part of the master. An exception to this general statement of the rule is where the dangerous instrumentality which causes the injury is exclusively in the control of the master. *Hardesty v. Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29, and *Callahan v. Chicago etc. Ry. Co.*, 47 Mont. 401, 47 L. R. A. (n. s.) 587, 133 Pac. 687, are illustrative cases. Under such circumstances, the happening of the accident raises the presumption of negligence on the part of the master and casts upon him the burden of showing that he was without fault;

in other words, the happening of the accident by reason of the employment of the instrumentality implies negligence on the part of the master, and in the absence of some explanation on his part, showing that he was without fault, a case is made sufficient to justify an award of damages to the injured employee. This doctrine has no application to the instant case.

From a memorandum opinion by the district judge accompanying the order granting the nonsuit, it appears that he entertained the view that the evidence discloses that at the time of the accident the plaintiff and Allen were engaged in creating the place in which they were at work; that under these circumstances they had assumed the risk of any injury likely to result to them, or either of them, by reason of a fall of rock caused by their operations, as one of the ordinary risks incident to the employment; and hence that the evidence failed to establish culpable negligence on the part of the defendants. Counsel insists that this view was erroneous and that for this reason plaintiff is entitled to a new trial. To support his contention, he cites, among other cases, *Kelley v. Fourth of July Min. Co.*, 16 Mont. 484, 41 Pac. 273, *Allen v. Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673, and *McInness v. Republic Coal Co.*, 49 Mont. 112, 140 Pac. 235. It must be conceded that the theory adopted by the court was erroneous. It does not follow, however, that a new trial must be awarded for this reason. All the cases cited by counsel proceeded upon the theory that there was substantial evidence showing that the defendant employer had omitted precautions which were manifestly necessary in the exercise of ordinary care to guard the safety of the employee. As we have pointed out above, the evidence in this record does not show [4] any culpable omission by the defendants. Hence, though the reason for granting the nonsuit was erroneous, plaintiff was not prejudiced by the ruling, and therefore is not entitled to a new trial.

The order is affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

GREAT NORTHERN RY. CO., APPELLANT, v. FISKE ET AL.,
RESPONDENTS.

(No. 3,829.)

(Submitted November 10, 1917. Decided November 22, 1917.)

[169 Pac. 44.]

Eminent Domain—Railroads—Award of Commissioners—Right to Appeal—Extent of Right.

1. Assuming (but not deciding) that section 7344, Revised Codes, confers the right of appeal in a condemnation proceeding upon plaintiff railroad as well as upon the land owner, the appeal must be taken from the entire award of the commissioners appointed to ascertain and determine the compensation to be paid to the owner, and cannot be prosecuted from any particular portion thereof with which the appellant may be dissatisfied.

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

CONDEMNATION PROCEEDINGS by the Great Northern Railway Company against George P. Fiske. From judgment on the award as made by the commissioners, plaintiff appeals. Affirmed.

Messrs. Veazey & Veazey and *Mr. O. W. Belden*, for Appellant, submitted a brief; *Mr. I. Parker Veazey, Jr.*, argued the cause orally.

Mr. E. K. Cheadle, for Respondent Fiske, submitted a brief, and argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

By appropriate proceedings begun in the district court of Fergus county, the plaintiff sought to condemn for railroad purposes a strip of ground containing 13.86 acres across the northwest quarter of section 36, township 16 N., range 17 E., M. P. M., belonging to the defendant. In due course the usual order

On effect of appeal in condemnation proceedings, see note in 2 L. R. A. (n. s.) 313.

was made declaring that the purposes to be served by the taking constitute a public use, and appointing commissioners "to ascertain and determine, according to law, the compensation to be paid * * * by reason of the appropriation." The commissioners, proceeding as required by Code section 7341, met, viewed the premises, heard the testimony offered, and made return into court of their findings as follows: I. That the actual value of the property sought to be taken is \$1,386. II. That the damages, by reason of such taking which will accrue to the portions of defendant's land not sought to be taken, are \$833.35. III. That the portion of defendant's property not sought to be condemned will not be benefited by such taking. IV. That the cost of good and sufficient fences and cattle-guards is \$200; "that the plaintiff shall pay to said defendant * * * as compensation and net damages" for such taking, "the sum of \$2,219.35, and shall also pay to him the cost of fences and cattle-guards, or give bond as required by law." Thereafter, and within the proper time, the plaintiff filed its notice, claiming under section 7344, Revised Codes, to appeal "from all those several parts of the award, report, and assessments of the commissioners," to-wit, parts I and III above mentioned; whereupon the defendant moved to dismiss the appeal as not taken in accordance with the provisions of said section, in that it is not taken from the whole, but only from certain parts, of the award, and "for that reason this court is without jurisdiction to hear and determine said appeal." This motion was sustained by the district court; judgment was entered upon the award as made by the commissioners, and from that judgment this appeal is taken.

The sole question presented is whether the plaintiff's attempt to appeal under section 7344 was sufficient, or, to paraphrase the language of plaintiff's counsel: Is either party, in taking [1] such an appeal, required to appeal from the entire award, or may either party appeal from only those portions of it with which he is dissatisfied?

We question whether, under section 7344, the plaintiff was entitled to appeal at all. A broad construction of the first sentence of that section and some of the provisions of section 7349, would indicate that it was; but the remainder of these sections as clearly implies that the right of appeal is confined strictly to the owner. It is the settled rule that in proceedings such as this the right to appeal is purely statutory and may be granted to, or withheld from, either party or both, at the discretion of the legislature, if no constitutional provision is thereby infringed. This question, however, we do not decide, preferring to assume, for the purposes of the present case, that such right does exist in the condemnor.

The plaintiff grounds its contention upon the proposition that section 7344, authorizes an appeal from "any assessment," and argues that, since under section 7341 the commissioners are required to "ascertain and assess" the various elements of damage (but not the total), each finding made in accordance with that section, constitutes "an assessment" from which appeal will lie. We think this is untenable. The very section (7344) on which the right of appeal depends provides that the appeal "shall be brought on for trial upon the same notice and in the same manner as other civil actions, and unless a jury shall be waived by the consent of all parties to such appeal, the same shall be tried by jury, and *the damages* to which appellant may be entitled *by reason of the appropriation* of his property, shall be reassessed upon the same principle as hereinbefore prescribed for the assessment of such damages by commissioners." This clearly implies that not only is the case to be tried *de novo* before the jury, but it is to be tried *de novo* as to all the elements which go to make up "the damages," to which the owner may be entitled "by reason of the appropriation of his property." Again: "Upon any verdict or assessment by commissioners becoming final, judgment shall be entered declaring that * * * the right * * * to take, use and appropriate the property described in such verdict or assessment * * * shall * * * be and remain in the plaintiff. * * * In

case the party appealing from the award of commissioners * * * shall not succeed in increasing the amount of damages finally awarded to him in such proceeding, he shall not recover the costs of such appeal." These expressions make it obvious, in our opinion, that the words "any assessment," as used in the first sentence of the section, are intended to refer, not to the findings or specifications going to make up the award, but to the award itself—the total assessment of damages as made pursuant to section 7341.

In this we are confirmed by the language of cognate sections: "No improvements upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages." (Sec. 7342.) "Within thirty days after making their appraisement and the assessment of damages, the commissioners must file a report," *etc.* (Sec. 7343.) "The plaintiff must, within thirty days after final judgment, pay the sum of money assessed." (Sec. 7346.) "At any time after the report and assessment of damages of the commissioners has been made * * * and either before or after appeal from such assessment * * * the court * * * shall have power to make an order that upon payment into court * * * of the amount of damages assessed, * * * the plaintiff be authorized, if already in possession * * * to continue in such possession: * * * Provided, however, that * * * the court * * * may * * * require the plaintiff * * * in addition to paying into court the amount of damages assessed, to give bond * * * conditioned to pay defendant any additional damages and costs over and above the amount assessed; * * * the amount assessed as damages by the commissioners or by the jury on appeal, as the case may be, shall be taken and considered * * * as just compensation; * * * but the plaintiff, by payment into court of the amount assessed, or by giving security as above provided, shall not be thereby prevented or precluded from appealing from such assessment; * * * in all cases where the plaintiff deposits the amount of the assessment * * * the defendant * * * may at any

time demand and receive * * * the money so deposited, and shall not by such demand or receipt be barred or concluded from his right of appeal from such assessment, but may, notwithstanding, take and prosecute his appeal from such assessment; Provided, that if the amount of such assessment is finally reduced on appeal by either party, such defendant who has received the amount of the assessment deposited shall be liable to the plaintiff for any excess, * * * with legal interest; * * * and provided, further, that upon any appeal from assessment of damages by the commissioners to a jury, the jury may find as compensation or damages a less as well as an equal * * * amount than that assessed by the commissioners." (Sec. 7349.) The bearing of this language and its inapplicability to an appeal from part of an award or total assessment are manifest.

The order dismissing plaintiff's appeal was properly made, and the judgment before us must therefore be, and it is, affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied December 12, 1917.

WELLS FARGO & CO., RESPONDENTS, v. HARRINGTON
ET AL., APPELLANTS.

(No. 3,819.)

Submitted November 8, 1917. Decided November 26, 1917.)

[169 Pac. 463.]

Taxation — Corporations — "Franchise" — Constitutional Law — Construction.

Taxation—Corporations—"Franchise"—When Taxable.

1. *Held*, that the franchise which is made taxable by the Constitution is not the bare right conferred upon corporations to do business

Authorities discussing the question of taxation of corporate franchise, generally, are collated in a note in 57 L. R. A. 34. Specifically as to what are franchises, see page 35 of above note.

in the state, but that special privilege, not enjoyed by citizens generally, which represents something out of which the tax may be realized by forced sale, if necessary, as, for instance, the franchise of street railway, telephone and telegraph, gas and water companies; hence the franchise of an express company under which it enjoys no such special privilege is not subject to taxation.

[As to distinction between franchise and license granted to corporation, see note in *Ann. Cas.* 1916B, 210.]

Constitution—Contemporaneous Construction—Effect.

2. Contemporaneous construction by the legislature of a constitutional provision raises a strong presumption that such construction, if uniform and long acquiesced in by the people and applied by the officers intrusted with its execution, rightly interprets the provision; and while such construction is not conclusive, it is entitled to most respectful consideration.

Appeal from District Court, Silver Bow County; J. B. McClernan, Judge.

INJUNCTION by Wells Fargo & Co. against John J. Harrington, County Treasurer of Silver Bow County, and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Mr. J. B. Poindexter, Attorney General, and *Mr. M. F. Canning*, County Attorney of Silver Bow County, for Appellants, submitted a brief; *Mr. Frank Woody*, Assistant Attorney General, argued the cause orally.

Franchises are property and taxable. (*Adams Express Co. v. Ohio State Auditor*, 166 U. S. 185, 41 L. Ed. 965, 17 Sup. Ct. Rep. 604; *Board of Commrs. v. Rocky Mountain N. P. Co.*, 15 Colo App. 189, 61 Pac. 494; *Iron Silver Min. Co. v. Cowie*, 31 Colo. 450, 72 Pac. 1067; *Cedar Rapids W. Co. v. City of Cedar Rapids*, 118 Iowa, 234, 91 N. W. 1081; *People v. State Board of Tax Commrs.*, 174 N. Y. 417, 105 Am. St. Rep. 674, 67 N. E. 69; *Thompson v. Schenectady Ry. Co.*, 124 Fed. 274; *Edison Electric I. Co. v. Spokane County*, 22 Wash. 168, 60 Pac. 132; *Commercial Electric L. & P. Co. v. Judson*, 21 Wash. 49, 57 L. R. A. 78, 56 Pac. 829; *Western Union Tel. Co. v. Norman*, 77 Fed. 13; *Henderson Bridge Co. v. Commonwealth*, 166 U. S. 150, 41 L. Ed. 953, 17 Sup. Ct. Rep. 532; *San Jose Gas Co. v. January*, 57 Cal. 614; *People ex rel. Burke v. Badlam*, 57 Cal. 594; *Tay-*

lor v. Secor, 92 U. S. 575, 23 L. Ed. 663; *Tremont & Suffolk Mills v. City of Lowell*, 178 Mass. 469, 59 N. E. 1007; *People ex rel. Platt v. Wemple*, 117 N. Y. 136, 6 L. R. A. 303, 22 N. E. 1046; *Crocker v. Scott*, 149 Cal. 575, 87 Pac. 102.)

Messrs. Kremer, Sanders & Kremer, for Respondent, submitted a brief; *Mr. Louis P. Sanders* argued the cause orally.

It is a well-settled principle of law that the description of property for taxation must be definite, or, at least, of sufficient definiteness to identify the property taxed, and it is a rule of law that an indefinite description of a franchise renders the assessment and taxation void. "The description on the assessment-roll of a city, 'the — company franchise,' is not sufficient." (*Southwestern Tel. & Tel. Co. v. City of San Antonio*, 32 Tex. Civ. 101, 73 S. W. 859.) The description here is equally indefinite. What franchise is taxed? The franchise to be, or the franchise to do? Or, indeed, is it not the volume of business itself that is taxed? We submit that this is what was attempted to be taxed, and that, in so far as the assessment goes, there was no franchise whatsoever taxed, because there is no such thing as a franchise on intrastate business, the only taxable thing in connection therewith being the business itself.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Wells Fargo & Co., a corporation organized under the laws of Colorado and authorized to do and doing business in this state, having paid to the secretary of state the fees required as a condition precedent to doing business here, and having paid its annual license taxes and taxes upon its tangible property, brought this action to restrain the collection of a further tax upon a valuation of \$30,000 fixed by the assessor of Silver Bow county upon the company's franchise on all intrastate business done by it in this state. The district court overruled a demurrer to the complaint, and the county and its treasurer, declining to

plead further, suffered judgment to be entered against them, and appealed.

The indorsement on the assessment-roll must be held to indicate an intention on the part of the assessor to describe the franchise of this company and to fix the valuation thereof upon the basis of the amount of intrastate business transacted by it, and this presents for our determination the question: Does the plaintiff corporation exercise or enjoy a franchise in this state, as the term is used in the Constitution and statutes?

The subject—taxation—is considered in Article XII of our state Constitution. All property is subject to taxation, except such public and *quasi*-public property as is specially exempted and such other property as may be exempt by law. (Sec. 1.) The power to tax corporations or corporate property shall never be relinquished, and every corporation in this state or doing business herein shall be subject to taxation on all real or personal property owned or used by it, unless it belongs to a class of property which is exempt. (Sec. 7.) All property shall be assessed in the manner prescribed by statute or by the Constitution. (Sec. 16.) Section 17 defines property to include moneys, credits, bonds, stocks, franchises, *etc.*

The question, Is a franchise granted by this state subject to taxation? is not open to discussion. The Constitution answers [1] it in the affirmative, and no amount of judicial learning exhibited in decided cases can add to or subtract from that determination. But what is meant by a “franchise,” as that term is employed in our Constitution? That it is not a word to which is attached a limited, precise, well-understood and generally accepted meaning is evidenced by the fact that in *Words and Phrases* (first edition and second edition) twenty-two pages are given over to definitions of the term. In its broad significance the word is used frequently to denote a right or privilege conferred by law, and in this sense we speak of the elective franchise as a privilege enjoyed by every one of our citizens who possesses the qualifications prescribed by law. The right to exist as a corporation in this state is a franchise or

privilege conferred upon any individuals who meet the requirements of the statutes. So, likewise, the authority to conduct business in this state as a corporation is a franchise, and in this sense every corporation enjoys a franchise, even though it may be formed for religious, benevolent, charitable, educational, literary, scientific or social purposes, or for the promotion of painting, music or other fine arts. But the authority to engage in any of these undertakings is not peculiar to corporations. Every individual may pursue the same lines of endeavor to the same extent without permission from the state, and enjoy all the rights, privileges and benefits accorded to the corporation. Other illustrations might be drawn of the use of the term in this comprehensive sense. The word also has a more restricted meaning, to denote a special privilege conferred upon certain individuals, associations and corporations, not enjoyed by the citizens generally. For example: Under its franchise a street railway may lay its tracks upon and operate its cars over public roads, streets and alleys, and occupy such thoroughfares to the exclusion of the public, to the extent necessary to the conduct of its business. A telegraph or telephone company under its franchise may use such public places for its pole lines and wires; and a gas or water company, by virtue of the like authority, may tear up the streets and other public roads, and to that extent impede public travel, for the purpose of laying, repairing, or renewing its mains. These examples might be multiplied almost indefinitely, for such franchises are about as varied as the purposes for which corporations may be organized; but the foregoing suffice to illustrate a character of public privilege or franchise not conferred upon or enjoyed by the public generally.

If the bare privilege of doing business as a corporation is a franchise, within the meaning of that term as employed in the Constitution, then every corporation in this state is taxable upon its franchise, whether it be engaged in religious or charitable work, or in buying and selling dry-goods, groceries and other wares, in the printing or publishing business, or in any other one of the numerous occupations mentioned in section 3808, Revised

Codes, unless its franchise as such is devoted exclusively to some purpose mentioned in section 2499, Revised Codes.

But this court may not arbitrarily formulate a definition of the word "franchise" and determine this appeal accordingly. The duty is laid upon us to ascertain, if possible, the meaning which the framers of the Constitution intended should be attached to the term. In an effort to carry into effect the mandates contained in Article XII of the Constitution, the legislative assembly in 1891 availed itself of the first opportunity presented after the Constitution was adopted to enact a general revenue measure to meet the changed conditions incident to the admission of the state. The Act was very comprehensive in its terms, contained 206 sections, and treated of every phase of the assessment of property and the imposition and collection of taxes. (Laws 1891, pp. 73-129.) Section 11 provides for the assessment of the property—including franchises—of railroads operated in more than one county, and follows closely the language of the Constitution. Section 26 provides that the *personal property* of express companies must be listed and assessed in the county, town or district where such property is usually kept. Section 27 provides for the assessment of the personal property and *franchises* of gas and water companies, section 29 for the assessment of street railways and their *franchises*, and section 30 for the assessment of railroads operated in one county only, telegraph, telephone and electric light lines and their *franchises*, canals, ditches and flumes. These several provisions were carried forward into the compilation of 1895 (Pol. Code, sec. 3719) without change, except that after the word "flumes," in section 30, there was added "and the franchises of the same," and with this change they were brought into the revision of 1907 (sec. 2529) and constitute the law upon the subjects to-day.

It is strikingly noticeable that during all these years, in all of our legislation, though specific reference is made to the taxable property of an express company, no mention whatever is made of the franchise of an express company; whereas, during all of the period the franchise of every railroad, street railway, gas,

water, telegraph, telephone, electric light, canal, ditch and flume company is singled out as a species of property made subject to taxation. For this discrimination there must have been some excuse or justification, and in our opinion it is to be sought in the character of the business itself. An express company, in the conduct of its business, enjoys no greater privilege in this state than a messenger boy who carries packages from one place to another for hire. The expressman, whose outfit consists only of a horse and wagon, and who moves baggage, furniture and like articles for hire, is engaged in the express business and enjoys all the rights and privileges granted to Wells Fargo & Co. An express company has no greater rights in the streets, roads and other public places than the humblest pedestrian. Anything that it can do the private citizen can do to the extent of his capacity. Every other one of the corporations enumerated in the Revenue Act enjoys some special privileges and advantages which the citizens generally do not possess. In other words, the legislature has distinguished the privileges conferred by the government upon the people generally, from those special privileges conferred upon certain persons, associations and corporations, and has designated a privilege of the latter class by the term "franchise."

It is the contention of appellants that every foreign corporation, admitted to do business in this state, is authorized by section 4420, Revised Codes, to exercise the power of eminent domain, and that this plaintiff enjoys that special privilege, which is not conferred upon the citizens generally; but the statute does not so provide. It only gives to such foreign corporation the same right in this behalf as is enjoyed by the domestic corporation engaged in the like business; and counsel have failed to indicate wherein section 7331, Revised Codes, authorizes a domestic corporation engaged in the express business to invoke the power of eminent domain to any extent or for any purpose, not open to a private individual.

Section 18, Article XII, provides: "The legislative assembly shall pass all laws necessary to carry out the provisions of this

Article.” As we have seen, the legislature endeavored to carry this mandate into execution by the enactment of our revenue laws, in which the term “franchise” is construed to mean a special privilege conferred by the state directly or indirectly to do or perform certain acts or things which, in the absence of the special privilege, could not be done, and which special privilege the citizens generally do not enjoy by common right. This construction was placed upon the language of the Constitution, substantially contemporaneous with its adoption, has been continued throughout the twenty-six years since the enactment of the statute, has been acquiesced in by the people and applied by the revenue officers, constituting a part of the executive branch of the government, and is indicative of the public policy of the state.

In providing for taxation of property, the obvious purpose was to raise revenue, and therefore it is self-evident that, when the Constitution employs the term “franchise,” it refers to something which has a practical money value, and out of which the tax may be realized by forced sale, if necessary. Section 2502, Revised Codes, provides: “All taxable property must be assessed at its ‘full cash value.’” Section 2501 defines the terms “value” and “full cash value” to mean “the amount at which the property would be taken in payment of a just debt due from a solvent creditor.” The bare privilege granted to a corporation to do business is in the nature of a personal privilege. It cannot be sold or transferred by the corporation; neither can it be seized or sold under legal process. But the franchise of a corporation—meaning thereby the special privileges essential to its successful operation in the particular business in which it is engaged—is a valuable property right, which may be sold by the corporation and is subject to seizure and sale under execution. To illustrate: The privilege conferred by the state upon a corporation to furnish gas for light and other purposes would be of no practical value, if the corporation could not obtain access to the streets and alleys of any city for the purpose of laying its mains without resort to eminent domain

proceedings, and yet such privilege might be denominated a "franchise" within the more comprehensive definition of the term. On the other hand, the privilege conferred by a municipality upon a corporation to use its streets, alleys and other public places for the purpose of laying its mains and supplying gas to its inhabitants is a valuable privilege, which forms a part of the aggregate of its property and may be sold by the corporation or under legal process. Aside from other considerations, this distinction alone might have justified the legislature in limiting the term "franchise" to special privileges of the latter class. This legislative interpretation of the language of the Constitution excludes the idea that the term "franchise" was intended to include the bare privilege enjoyed by every corporation in this state to conduct its business, without reference to the character of its business or the advantages accruing from the privilege.

There are decided cases which hold that the bare privilege of doing business as a corporation is property subject to taxation; but, in our opinion, the courts so holding confuse the terms "franchise" and "goodwill." The goodwill of a business is not dependent upon the fact that the business management is a corporation. It attaches to business conducted by a private individual or a partnership, as well as to corporate business, and is the principal element which enhances the value of a business over and above the value of the property employed in it.

The Constitution imposes upon the legislature the duty to provide the means for carrying into effect the provisions relating [2] to taxation, and it is a general rule that contemporaneous construction by the department of government specially delegated to carry out a provision of the Constitution raises a strong presumption that such construction, if uniform and long acquiesced in, rightly interprets the provision. (Cooley's Constitutional Limitations, 7th ed., p. 102.) While such construction is not conclusive upon the courts, it is entitled to the most respectful consideration (*Northern Pac. Ry. Co. v. Brogan*, 52 Mont. 461, 158 Pac. 820), and in this instance it furnishes the

only key to the intention of the framers of the Constitution in employing the term "franchise" in Article XII above.

It is a historical fact that, of the members of the legislative assembly of 1891 which passed our revenue law, eleven of them were active members of the constitutional convention, with the best opportunity to know and appreciate fully the intention manifested by the Constitution itself; and this is a factor which the supreme court of the United States deemed worthy of some consideration. (*Martin v. Hunter's Lessees*, 1 Wheat. 305, 4 L. Ed. 97.) In the absence of any evidence that a different meaning was intended, we accept the construction placed upon the language of Article XII by the legislature as indicating the definition of the term "franchise" intended by the framers of the Constitution.

The legislature has imposed upon every express company doing business in this state an annual license tax graduated according to the amount of its intrastate business (sec. 2774, Rev. Codes), and, if such company is a foreign corporation, it must also pay, for the privilege of entering this state to do business, the fees prescribed by section 165, Revised Codes, as modified by Chapter 37, Laws of 1915. In addition, all of its tangible property is liable to taxation under section 26 of the Revenue Act, now section 2525, Revised Codes. The complaint alleges that plaintiff has paid all of these taxes and charges, and the demurrer admits that these allegations are true.

It is our conclusion that Wells Fargo & Co. does not enjoy or exercise any such special privilege in this state as can be denominated a "franchise," as that term is employed in the Constitution, and for this reason the judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

AMERICAN EXPRESS CO., RESPONDENT, v. HARRINGTON
ET AL., APPELLANTS.

(No. 3,818.)

(Submitted November 8, 1917. Decided November 26, 1917.)

[169 Pac. 466.]

(For syllabus, see *Wells Fargo & Co. v. Harrington et al.*,
ante, p. 235.)

Appeal from District Court, Silver Bow County; J. B. McClernan, Judge.

INJUNCTION by the American Express Company against John J. Harrington, County Treasurer of Silver Bow County, and another. From a judgment in favor of plaintiff, the defendants appeal. Affirmed.

Mr. J. B. Poindexter, Attorney General, and *Mr. M. F. Canning*, County Attorney of Silver Bow County, for Appellants, submitted a brief; *Mr. Frank Woody*, Assistant Attorney General, argued the cause orally.

Messrs. Kremer, Sanders & Kremer, for Respondent, submitted a brief; *Mr. Louis P. Sanders* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

For all practical purposes of this appeal, the facts of this case are identical with those in *Wells Fargo & Co. v. Harrington*, *ante*, p. 235, 169 Pac. 463, just decided, and upon the authority of that case the judgment herein is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

CASES DETERMINED
IN THE
SUPREME COURT

AT THE
DECEMBER TERM, 1917.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. SYDNEY SANNER,
THE HON. WILLIAM L. HOLLOWAY, } **Associate Justices.**

GRANT, APPELLANT, v. WILLIAMS ET AL., RESPONDENTS.

(No. 3,824.)

(Submitted November 9, 1917. Decided December 12, 1917.)

[169 Pac. 286.]

Justice of the Peace—Police Judge—Liability for Judicial Acts
—Jurisdiction—Malicious Prosecution—False Imprisonment
—Presumptions—Complaint—Insufficiency.

Judges—Liability for Judicial Acts—Rule.

1. A judicial officer—whether of a court of general or of inferior and limited jurisdiction—cannot be held liable for damages in a civil suit for any act done by him as such—be the act grossly erroneous or even prompted by corrupt or malicious motives; provided it was done within jurisdiction of the subject matter and of the person who deems himself aggrieved by the act.

[As to personal liability of judges and judicial officers, see note in 137 Am. St. Rep. 47.]

Justice of the Peace—Police Judge—Jurisdiction—Irregularities.

2. A justice of the peace has no jurisdiction over cases arising under town ordinances, except where he may have been designated, under

section 3242, Revised Codes, to act as police judge, in which event failure to style himself "police judge," instead of "justice of the peace," is a mere irregularity insufficient to divest him of jurisdiction.

Same—Malicious Prosecution—Complaint—Insufficiency—Presumptions.

3. Since a justice of the peace cannot be held liable in damages for acts done within jurisdiction (par. 1, *supra*), and he may have jurisdiction in an action arising under town ordinances (par. 2, *supra*), failure of plaintiff to allege that such officer had not been designated to act as police judge when he did the things charged to have constituted the malicious prosecution damages for which were sought, was fatal to the complaint, the presumption being that official duty was regularly performed.

Same—Sureties—Insufficient Complaint—Effect.

4. Where the complaint in an action against a public officer and his sureties is insufficient to state a cause of action against the former, it likewise fails to disclose liability on the part of the latter.

Same—False Imprisonment—Complaint—Insufficiency.

5. Where a town ordinance required the police judge to exact bail of those arrested and brought before him on Sundays, and upon default to remand them to jail, complaint which, *inter alia*, stated that plaintiff had been falsely imprisoned by a justice of the peace under such circumstances, held insufficient in the absence of an allegation designed to overcome the presumption that the justice proceeded within the authority conferred by the ordinance.

Appeal from District Court, Blaine County; John W. Tattan, Judge.

ACTION by Hugh S. Grant against F. N. Williams, as Justice of the Peace of Chinook Township, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Mr. R. E. O'Keefe, for Appellant, submitted a brief and argued the cause orally.

The complaint states a good cause of action for malicious prosecution in the furtherance of a criminal conspiracy. A justice of the peace has no original jurisdiction in proceedings brought for the violation of a town ordinance. Of such proceedings the police court has exclusive jurisdiction. (Sec. 3298, Rev. Codes, subd. 1.) True, a justice of the peace may be called in, or selected, to act as a police magistrate, but when so acting he is, in law, a police magistrate and not a justice of the peace. The acts of Williams as justice of the peace in proceedings for the violation of a town ordinance against appellant were void

ab initio, and having been done wrongfully and maliciously, his liability follows, as of course. (12 Am. & Eng. Ency. of Law, 508, and cases cited.) While it may be true that by reason of the fact that appellant is seeking to establish a personal liability on the part of respondent for a wrong done by him under color of office, and that his official title need not have been set out in the title of the action (*Hirsh v. Rand*, 39 Cal. 315; *Van Cleave v. Bucher*, 79 Cal. 600, 21 Pac. 954), still, the character in which a party is sued may be determined from the body of the complaint as well as from the words used in the title (*Van Cleave v. Bucher*, *supra*; *Tate v. Shackelford*, 24 Ala. 510, 60 Am. Dec. 488; *Wolf v. Beaird*, 123 Ill. 585, 5 Am. St. Rep. 565, 15 N. E. 161; *Litchfield v. Flint*, 104 N. Y. 543, 11 N. E. 58; *Waldsmith v. Waldsmith*, 2 Ohio, 156), and the fact that one sued in his individual capacity is described in the title by the title of his office is of no consequence, there being nothing to mislead. (*Highway Commrs. v. Beebe*, 55 Mich. 137, 20 N. W. 826.)

Messrs. Norris & Hurd, for Respondents, submitted a brief; *Mr. E. L. Norris* argued the cause orally.

The acts chargeable against respondent Williams upon which an action for malicious prosecution might be based are: (1) The issuance of a warrant; (2) The requirement of bail; (3) The trial and discharge of appellant. All these acts are judicial rather than ministerial in character. (*Rains v. Simpson*, 50 Tex. 495, 32 Am. Rep. 609; *Whitzell v. Forgler*, 30 Kan. 525, 1 Pac. 823; *Howe v. Mason*, 14 Iowa, 510; *Clark v. Spicer*, 6 Kan. 440; *Burns v. Norton*, 59 Hun, 616, 15 N. Y. Supp. 75.) If the respondent Williams acted within his jurisdiction, then neither he nor his surety may be held liable for his judicial acts. (*Legates v. Lingo*, 8 Houst. (Del.) 154, 32 Atl. 80; *Curnow v. Kessler*, 110 Mich. 10, 67 N. W. 982; *Stone v. Graves*, 8 Mo. 148, 40 Am. Dec. 131; *Taylor v. Doremus*, 16 N. J. L. 473; *Cunningham v. Bucklin*, 8 Cow. (N. Y.) 178, 18 Am. Dec. 432; *Cooke v. Bangs*, 31 Fed. 640.) Under no theory of the case does the first cause of action state a cause of action against the respondent

United States Fidelity and Guaranty Company. If the respondent Williams was acting in an official capacity and within his jurisdiction, neither he nor his surety is liable, and if he were acting as a police magistrate of Chinook or in a private capacity, his surety could not be held. (*San Luis Obispo County v. Farnum*, 108 Cal. 562, 41 Pac. 445; *Allison v. People*, 6 Colo. App. 80, 39 Pac. 903; *State v. Bagby*, 160 Ind. 669, 67 N. E. 519; *Wilson v. State*, 67 Kan. 44, 72 Pac. 517; *People v. Pennock*, 60 N. Y. 421; *State v. Porter*, 69 Neb. 203, 95 N. W. 769; *People v. Edwards*, 9 Cal. 286; *Cooper v. People*, 85 Ill. 417; *Territory v. Ritter*, 1 Wyo. 318, 321.) There is nothing charged against respondent Williams in this cause of action that is beyond or in excess of his jurisdiction as a justice of the peace, and all his acts were official in character. If respondent Williams were acting as a justice of the peace and within his jurisdiction, then he may not be made to respond in damages for the imprisonment of appellant, and no cause of action is stated against him or his sureties. (*Pratt v. Gardner*, 2 Cush. (56 Mass.) 63, 48 Am. Dec. 652; *Robertson v. Hale*, 68 N. H. 538, 44 Atl. 695; *Smith v. Clark*, 37 Utah, 116, Ann. Cas. 1912B, 1366, 26 L. R. A. (n. s.) 953, 106 Pac. 653.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This is an appeal from a judgment of the district court in and for the county of Blaine, in favor of the defendants Williams and United States Fidelity & Guaranty Company, entered after an order sustaining their demurrers to the complaint.

The grounds for relief are set forth in plaintiff's complaint in two counts. The first alleges, in brief, that at the times mentioned defendant Williams was a justice of the peace in Chinook township, Blaine county, and that the defendant United States Fidelity & Guaranty Company was the surety upon his official bond; that the defendant Lutz was the town marshal of the town of Chinook; that Lutz and Williams conspired and confederated together to harass and annoy the plaintiff and to injure him in

his business; that on Sunday, January 24, 1915, in furtherance of such design, the defendant Lutz, under color of his office, maliciously and without probable cause entered the plaintiff's place of business and seized and arrested him; that he forcibly took him before Williams, who wrongfully and maliciously demanded of him \$100 in cash to secure his release; that, this demand having been refused, Williams wrongfully and maliciously directed plaintiff to be confined in jail; that he was accordingly put in jail by Lutz and there confined until 2 o'clock P. M. on the following day; that on January 25 Lutz lodged with defendant Williams a sworn complaint charging plaintiff with a violation of Ordinance No. 121 of the town of Chinook; that said Lutz and Williams both knew that plaintiff had not violated the ordinance; that Williams thereupon wrongfully and without probable cause issued a warrant for the arrest of plaintiff, putting it in the hands of Lutz, and fixing plaintiff's bail at \$250; that on the same day the plaintiff gave bail in the sum of \$250 in order to secure his release; that thereafter he appeared before Williams for trial, but that the complaint was dismissed upon his demand, and that he was thereupon discharged; and that all of the said acts were done by Williams under color of his office as a justice of the peace. The second count alleges, as ground for relief, the same facts as those which are alleged in the first to have occurred on January 24 when plaintiff was committed to jail. A separate demurrer was interposed to each count, the grounds thereof being identical, viz., that the facts stated do not constitute a cause of action, and that the allegations are uncertain, ambiguous and unintelligible.

The first count: Counsel devotes his principal argument to the [1] question whether the facts stated make a case of malicious prosecution. That they do not is manifest. It is alleged that, in doing the acts enumerated, Williams was acting as justice of the peace and under color of his office. These acts were therefore *prima facie* judicial. The rule is well established by the current of authority that a judicial officer cannot be held liable for damages in a civil suit for any act of his in that capacity,

if he had jurisdiction of the subject matter and of the person whose rights were affected by the particular proceeding. In this respect no distinction is made between judges of courts of general and those of inferior and limited jurisdiction. The immunity is not extended to these officers to protect them as individuals, but for the protection of society, upon the theory that the interests of society are best served if the judicial officer is left entirely free to act upon his independent convictions, uninfluenced by fear or apprehension of consequences personal to himself. The rule extends even to acts grossly erroneous or prompted by corrupt or malicious motives, provided only they are done within jurisdiction clearly conferred. The following authorities are sufficient to illustrate the rule: *Yates v. Lansing*, 5 Johns. (N. Y.) 282; *Id.*, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290; *Lange v. Benedict*, 73 N. Y. 12, 29 Am. Rep. 80; *Rains v. Simpson*, 50 Tex. 495, 32 Am. Rep. 609; *Clark v. Spicer*, 6 Kan. 440; *Howe v. Mason*, 14 Iowa, 510; *Legates v. Lingo*, 8 Houst. (Del.) 154, 32 Atl. 80; *Curnow v. Kessler*, 110 Mich. 10, 67 N. W. 982; *Stone v. Graves*, 8 Mo. 148, 40 Am. Dec. 131; *Taylor v. Doremus*, 16 N. J. L. 473; *Randall v. Brigham*, 7 Wall. (U. S.) 523, 19 L. Ed. 285; *Bradley v. Fisher*, 13 Wall. (U. S.) 335, 20 L. Ed. 646; *Robertson v. Hale*, 68 N. H. 538, 44 Atl. 695; *Pratt v. Gardner*, 2 Cush. (56 Mass.) 63, 48 Am. Dec. 652; 11 R. C. L., p. 815; 16 *Id.* 342; *Broom v. Douglass*, 175 Ala. 268, Ann. Cas. 1914C, 1155, 44 L. R. A. (n. s.) 164, 57 South. 860; *Stewart v. Cooley*, 23 Minn. 347, 23 Am. Rep. 690.

Usually a justice of the peace has no jurisdiction over cases [2] arising under town ordinances. (*State ex rel. Streit v. Justice Court*, 45 Mont. 375, 48 L. R. A. (n. s.) 156, 123 Pac. 405.) That the proceedings were instituted for the violation of an ordinance of the town of Chinook does not, however, overcome the *prima facie* presumption that Williams, though acting as a justice of the peace, was acting within his jurisdiction. Section 3296 of the Revised Codes establishes a police court in every city and town. The jurisdiction of such courts is defined by sections 3297 and 3298. That conferred by the former is

concurrent with that of a justice of the peace in both civil and criminal cases, the latter being prosecuted in the name of the state. The jurisdiction conferred by the latter is exclusive, and proceedings for violations of ordinances are prosecuted in the name of the city or town. To avoid the expense incident to the maintenance of a separate police court, a town may designate a justice of the peace of the township in which the town is situated to act as police judge for the town. (Sec. 3242.) This provision does not declare that the justice shall style himself police judge, but merely that he shall act as such. Presumably he should keep a separate docket in order to prevent confusion in the records of his office. Yet, since the statute does not require him to style himself police judge in the proceedings instituted by the town, we apprehend that he would be deemed to have acquired jurisdiction of the subject matter of them and the parties to them, though the proceedings should be entitled by him in his court as justice of the peace, provided they are otherwise regular in form and are prosecuted in the name of the town. Indeed, the aim of section 3296 seems to have been to confer the additional jurisdiction upon the justice as such, and not to constitute him the holder of another office under the title of police judge. In any event, inasmuch as the additional jurisdiction in such cases is fully conferred upon the justice so designated, the use of the title "justice of the peace," instead of "police judge," would be a mere irregularity which would not divest him of [3] jurisdiction. Now, it is a presumption of law that official duty has been regularly performed. (Rev. Codes, sec. 7962, subd. 15; *Stephens v. Conley*, 48 Mont. 352, Ann. Cas. 1915D, 958, 138 Pac. 189; *State v. Groom*, 49 Mont. 354, 141 Pac. 858.) If this presumption is to be indulged in favor of the defendant Williams, the fact that he entertained the complaint for a violation of the ordinance, coupled with the fact that he was a justice of the peace of the township in which the town of Chinook is situated, warrants the *prima facie* conclusion that he had been designated as police judge at the time and that the proceeding was within his jurisdiction. To make out a case against him, it

was therefore necessary that the complaint allege that he had not been so designated. In omitting to do this, the complaint fails to state a cause of action. Since it omits to disclose a liability [4] on the part of Williams, it wholly fails to disclose a liability on the part of his codefendant surety.

The second count: The question presented by the general [5] demurrer to this count is whether it states a case for relief for a false imprisonment. What has already been said furnishes the answer to this question. It is not alleged that the arrest of plaintiff was instigated by Williams, nor that he aided and abetted Lutz in it. Nor is it alleged that a complaint had not been made and that the arrest was not under a warrant. The only direct connection Williams is alleged to have had with the arrest is that he required bail of the plaintiff in order to secure his release, and that upon the refusal of bail he directed plaintiff to be imprisoned. But aside from these considerations, if the presumption referred to above is to be given any force, it was the duty of Williams, under the ordinances of the town, to require bail of those arrested and brought before him on Sunday charged with offenses, and upon default to remand them to jail until complaints could be prepared and the charges brought on for trial in the regular way. Since there is no allegation to overcome the presumption that he proceeded within the authority conferred by the ordinances, the facts stated do not constitute a cause of action.

The judgment is affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

BRUSH, RESPONDENT, v. CITY OF HELENA, APPELLANT.

(No. 3,845.)

(Submitted December 3, 1917. Decided December 14, 1917.)

[169 Pac. 285.]

*Cities and Towns—Licenses—Illegal Exaction—Recovery Back
—Parties in Pari Delicto.*

1. Where city officials, quarterly for some five years, collected a sum of money from a pop-corn vender in such a manner and through such channels as of necessity to advise him that the money paid was the price of immunity from interference with the privilege of keeping his wagon on a street corner in violation of an ordinance, he was *in pari delicto* and not in position to recover back the money so paid.

[As to the rule of *pari delicto*, see note in 113 Am. St. Rep. 724.]

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by Benjamin L. Brush against the City of Helena. Judgment for plaintiff and defendant appeals. Reversed.

Mr. Edward Horsky, for Appellant, submitted a brief and argued the cause orally.

If the transaction here involved was unlawful, plaintiff was *in pari delicto*, and the court will leave him where it finds him. (*Glass v. Basin & Bay State Min. Co.*, 31 Mont. 21, 33, 77 Pac. 302; *City of Philipsburg v. Degenhart*, 30 Mont. 299, 305, 76 Pac. 694; 9 Cyc. 546.) After he kept this up for five years, paying quarterly, and after he had received and enjoyed the privilege, it does not lie in his mouth to claim he was defrauded.

Money illegally and erroneously collected for licenses cannot be recovered back if voluntarily paid and not for or on account of any property taxes assessed. (*O'Brien v. Colusa County*, 67 Cal. 503, 8 Pac. 37.) One cannot recover back from a city money paid for a license which the city had no power to require, the city officials having asserted that they had the power, and the money being paid in consequence of such assertion. (*Holder v. City of Galena*, 19 Ill. App. 409.)

Payment of a license fee by a hackman, upon a threat to stop his hack, without objection except as to the amount, is voluntary, and no recovery can be had, though the tax was illegal. (*City of Jackson v. Newman*, 59 Miss. 385, 42 Am. Rep. 367.) Threat of legal process is not duress, for the party may plead and make proof, and show that he is not liable. Where the collector demanded of the defendants the amount of the license tax due by them as merchants, and threatened a prosecution therefor, and the defendants paid under protest, it was held that the payment was not under duress. (*Claflin v. McDonough*, 33 Mo. 412, 84 Am. Dec. 54; *Irving v. St. Louis County*, 33 Mo. 575; *Maxwell v. San Luis Obispo County*, 71 Cal. 466, 12 Pac. 484; *City of Savannah v. Feeley*, 66 Ga. 31.) A person who has paid money for a license as a wagoner under protest, but with no mistake of fact, cannot recover it back. (*Cook v. City of Boston*, 9 Allen (91 Mass.), 393.) If one pay willingly, though irregularly and without obligation, it may not be recovered back. (*Union & Planters' Bank v. City of Memphis*, 107 Tenn. 66, 64 S. W. 13.) "A mere threat to begin action for the collection of a penalty for failure to pay a license fee does not render a payment of such fee under protest an involuntary payment." (*Southern Ry. Co. v. Mayor etc. of City of Florence*, 141 Ala. 493, 3 Ann. Cas. 106, 37 South. 844.) Where a license has been paid for and enjoyed, the money given therefor cannot be recovered back although imposed without authority. (*Washington v. Barber*, Fed. Cas. No. 17,224.)

Plaintiff admits: (a) That he was violating the law; (b) that to avoid being arrested, he paid the money; and was thus either stifling prosecution or defeating regular proceedings in a court of justice. Such transaction was clearly contrary to public policy and void. (*Johnson v. Douglas*, 32 Wash. 293, 73 Pac. 374; 9 Cyc. 546.)

Plaintiff violated the ordinances. According to his own statement, he paid the sum voluntarily from time to time to certain officers of the city. Under such state of facts, plaintiff has no cause of action which he can maintain to recover back

the amounts so paid. (4 Dillon on Municipal Corporations, secs. 1621-1623.)

“The courts even go so far as to hold that money collected from individuals by a city or its officials under a threat to use legal remedies to collect the same does not make such payment compulsory in law.” (*Taylor v. Philadelphia Board of Health*, 31 Pa. St. 73, 72 Am. Dec. 724.)

Messrs. E. A. & F. E. Carleton, for Respondent, submitted a brief; *Mr. F. E. Carleton* argued the cause orally.

Counsel contends that if the transaction was unlawful, plaintiff was *in pari delicto*, and the court will leave him where it finds him, and 9 Cyc. 546 is cited. As this text points out, there are numerous exceptions to the rule. (Pages 551, 552.) There is no testimony in the record that respondent was aware that he was violating any law or ordinance or doing anything that was improper. He trusted everything to the city and its officials. Therefore the doctrine does not apply. We concede the rule to be that where the parties stand on an equal footing and the transaction is perfectly open and above board, and both parties to the contract fully understand, know and appreciate that the contract which they have entered into is against public policy and void, and knowing this they enter into it, no recovery can be had by one for a breach of the contract by the other. In such cases the doctrine of *in pari delicto* applies. But that is not the case at bar. This peanut vender knew nothing about the legal rights of the city or even of his own with reference to the matter, and was entitled to assume that the city knew what it was doing and had the power to act as it did. The parties here did not stand on an equal footing and the doctrine does not apply. (*Callaway v. Milledgeville*, 48 Ga. 309; *Bruner v. Town of Stanton*, 102 Ky. 459, 43 S. W. 411; *Bergmeyer v. Greenup County* (Ky.), 44 S. W. 82; *Jackson v. Newman*, 59 Miss. 385, 42 Am. Rep. 367; *Drew County v. Bennett*, 43 Ark. 364; *Catoir v. Watterson*, 38 Ohio St. 319; *Shelton v. Silver Field*, 104 Tenn. 67, 56 S. W. 1023.) The ques-

tion now before this court came squarely before the Colorado court of appeals in 1898 in the case of *Walsh v. City of Denver*, 11 Colo. App. 523, 53 Pac. 458. There it was held that the payment of a license fee exacted by a void ordinance is involuntary and may be recovered back from the city. (See, also, *City of Chicago v. Sperbeck*, 69 Ill. App. 562; *Douglas v. Kansas City*, 147 Mo. 428, 48 S. W. 851; *City of Toledo v. Buecele*, 19 Ohio C. C. 127; *Mayor v. Radeclese*, 49 Md. 226; *State v. Dering*, 84 Wis. 585, 36 Am. St. Rep. 948, 19 L. R. A. 858, 54 N. W. 1104; *City of Jacksonville v. Ledwith*, 26 Fla. 163, 23 Am. St. Rep. 558, 9 L. R. A. 69, 7 South. 885; *McGregor v. Village of Lovington*, 48 Ill. App. 211; 30 Cyc. 1303.)

“The payment of an illegal tax to a municipal corporation under any circumstances which, in theory of law constitutes it an involuntary payment, may be recovered by ordinary action.” (6 McQuillin on Municipal Corporations, sec. 2507; *Douglas v. Kansas City*, *Leonard v. City of Canton*, *supra*.)

MR. JUSTICE SANNER delivered the opinion of the court.

Action to recover \$1,700 paid to the city of Helena under the circumstances hereinafter stated. Plaintiff had a verdict for \$1,175 and judgment accordingly. From that judgment the city appeals, and it also asserts an appeal from an order entered in the district court denying it a new trial.

The asserted appeal from the order is without validity, because not taken in time. The appeal actually here is from the judgment only; and, as the fundamental and, in our opinion, decisive proposition thus presented is whether there is any evidence to support the verdict and judgment, we deem it unnecessary to consider the many other questions which the industry of counsel has submitted.

The case made by the plaintiff, respondent here, is this: In July, 1908, he desired to go into business at Helena selling popcorn, peanuts, chewing-gum, and other trifles and bought a suitable wagon for that purpose; he wished to locate himself and his wagon upon the public street at the American National

Bank corner of Sixth and Main; he applied to the city treasurer for a license, was told there was none, to go ahead; he started at the location he had selected, but after twenty days was stopped by the chief of police; he then made application in writing to the city council "for a license or the privilege," which application was presented and refused; he then went to Mayor Edwards, who promised to see what could be done; two weeks later he was told by the chief of police that an arrangement had been made to let him operate on the street, and was directed to report next day at the office of the chief; he reported, and the chief said "what the tax would be," to-wit, \$100 per quarter, the desired location being designated; he then accompanied the chief to the police court, where the chief told the police judge, "This man pays \$100"; he made a check payable to the police judge for \$100 and thereafter quarterly made similar checks, except that after the first four the checks were made to the chief of police, until December, 1912, when the quarterly amount paid was \$50, until he quit in October, 1913; he paid in all \$1,700. He was never before the police court but the one time, nor served with nor shown any papers in connection with the matter, but "paid to get off from being arrested"; it was "made plain" to him that he "had to pay or get off the street or be arrested," and he paid to avoid the alternative; he "supposed the authorities had the right to demand the money, and paid it to the chief of police with that understanding"; he never knew the contrary until September, 1913, a month before he quit. Touching the reduction he says: "I had hunted up the members of the council and the mayor and asked them for a reduction; * * * but the mayor usually thought it was cheap enough. * * * Later some of the council thought it was pretty steep; * * * I told them I could not stand the price, and if they did not reduce it I would get off; * * * they reduced it to \$50." On cross-examination he says his wagon was at the location desired every afternoon and evening from July, 1908, to October, 1913, that he did not know that he was there contrary to any ordinance,

but supposed he was rightfully there, and that he sought a permit in the first instance because he knew he would have to have a permit of some kind and wanted to get along with the city.

It is beyond doubt that we have here one of those left-handed [1] transactions in which city officials too often indulge, and which bear upon their face the stamp of irregularity, carrying to every mind, particularly to the participants, the knowledge that something is wrong. In view of this and of the facts that the plaintiff had started without leave and been stopped by the chief of police, had then sought and been denied a permit by the council, had thereafter secured an "arrangement" which was inaugurated in the police court and transacted through the police office, he cannot plead total ignorance or innocence, or assert, as he does, that he was wholly misled and deceived by misrepresentations or false claims of rightful authority upon the part of the city officials.

These inferences the evidence on the part of the city but serves to emphasize; for, instead of aiding the plaintiff, it tends to show that his location at the coveted point was the result of an "arrangement" between him and the mayor; that this arrangement was made after he had been told of ordinances which forbade him to keep a wagon on the streets, prevented the granting of any such license or permit as he desired; and that the arrangement required him to make the quarterly payments in such a way that they were obviously the price of immunity from interference.

Now, the city got all the money the plaintiff paid; and either it had or it had not the right to permit him for a price to occupy, and therefore obstruct, the street with his wagon. If the city had that right, and the method only was irregular, the plaintiff has no complaint even on his own theory. If the city had not the right, then the wrong done was against the public, against others, not the plaintiff. He still got what he bargained for—the enjoyment of the desired location for over five years, undisturbed by interference on the part of the city.

What he sought was immunity, and it was granted. If it was unlawfully granted, he was *in pari delicto*, and the law will not aid him to recover back the money which, so far as he is concerned, represents value received. "*In pari delicto, potior est conditio defendentis.*"

On any theory, therefore, the plaintiff is not entitled to recover upon the evidence presented; in other words, the judgment stands unsupported by evidence.

It is therefore reversed, with directions to dismiss the action.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
CONCUR.

THOMAS, APPELLANT, v. HORST ET AL., RESPONDENTS.

(No. 3,851.)

(Submitted December 3, 1917. Decided December 17, 1917.)

[169 Pac. 731.]

*Public Lands—Northern Pacific Land Grant—Mining Claims—
Mineral Land Commission—Classification of Lands.*

Public Lands—Mineral Land Commission—Effect of Classification of
Lands.

1. *Held*, that the determination of the mineral land commission created by the Act of Congress of February 26, 1895 (28 Stats. 683, Chap. 131), that certain lands situated within the territorial limits of the Northern Pacific land grant were nonmineral, was final and conclusive, in the absence of fraud, even though subsequent development disclosed that the classification was erroneous.

Same—Conclusiveness of Decision of Land Department.

2. The allegation in plaintiff's complaint that patent to land, claimed by him under mineral locations and by defendant railway company as part of the land granted to it by the federal government, had issued to defendant, was tantamount to an allegation that the land had been duly classified as nonmineral under the Act of Congress of 1895 above, and the classification approved by the secretary of the interior before the mineral claims were located; hence, inasmuch as

For authorities passing on the question as to location of mining claim on railroad aid grant, see note in 7 L. R. A. (n. s.) 801.

the decision of the Land Department thus made is conclusive upon the courts in the absence of fraud, and no fraud was charged, dismissal of the complaint was proper.

Same—Mineral Land Commission—Manner of Determining Character of Land.

3. The presence of a patented quartz lode mining claim in the vicinity of the land claimed by plaintiff under mineral locations was not alone sufficient to show that the land claimed by him was also mineral; this fact could, under section 3 of the Act of 1895 above, properly be taken into consideration by the mineral land commissioners in determining the character of the land, but did not compel them to classify it as mineral.

[As to the determination of mineral or nonmineral character of public land, see note in Ann. Cas. 1912A, 1302.]

Appeal from District Court, Silver Bow County; J. B. McClernan, Judge.

SUIT by William E. Thomas against Carl H. Horst, as administrator of the estate of Barbara H. Horst, deceased, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Mr. Edwin M. Lamb and *Mr. John T. Andrew, Jr.*, for Appellant, submitted a brief; *Mr. Lamb* argued the cause orally.

We have no legal title—this has been repeatedly held. The only remedy is, as said by the supreme court of the United States, “the remedy of the aggrieved party must be sought by him in a court of equity.” (*Steel v. St. Louis Smelting etc. Co.*, 106 U. S. 447, 27 L. Ed. 229, 1 Sup. Ct. Rep. 389.) The situation is this: The mineral claimant, plaintiff, made a discovery of minerals upon the public domain, lands excluded by the Act of Congress of 1864, from being acquired by the railroad company, immediately surrounded by patented mining claims, which the law say “distinctly characterizes them as mineral land,” and the railroad company afterward, clandestinely, in so far as this plaintiff is concerned, applied for and received a patent to lands, which the law says it should not obtain. Having thus obtained it, we believe that it was by mistake, and such a mistake as entitles us to ask relief in this court of equity. (*Hedrick v. Atchison etc. R. R.*, 167 U. S. 673, 42 L. Ed. 320, 17 Sup. Ct. Rep. 922; *Van Wyck v. Knevals*, 106 U. S. 360, 27 L. Ed. 204, 1 Sup. Ct.

Rep. 336; *Duluth & Iron Range R. R. Co. v. Roy*, 173 U. S. 587, 43 L. Ed. 822, 19 Sup. Ct. Rep. 549.)

The Land Department, as in *Burfenning v. Chicago etc. Ry. Co.*, 163 U. S. 321, 41 L. Ed. 175, 16 Sup. Ct. Rep. 1018, acted in disregard of an established and recorded fact shown by their own records when they issued the patent to the railroad company, and at the very time their records disclosed that these grounds were mineral, hence plaintiff is entitled to relief. (*Lytle v. Arkansas*, 22 How. (U. S.) 193, 16 L. Ed. 306; *Garland v. Wynn*, 20 How. (U. S.) 8, 15 L. Ed. 805; *Lindsay v. Hawes*, 2 Black (U. S.), 559, 17 L. Ed. 265; *Johnson v. Towsley*, 80 U. S. 72, 20 L. Ed. 485; *Johnson v. Towsley*, 80 U. S. 72, 20 L. Ed. 487, 488; *Burke v. Southern P. R. Co.*, 234 U. S. 669, 58 L. Ed. 1527, 1549, 34 Sup. Ct. Rep. 907.)

The supreme court of California had under consideration a case identical with this and they reviewed many of the cases dealing with the subject matter. In this California case the mining claim was located six months before the patent was issued to the railroad company, and they hold that the mineral claimant is entitled to have the title quieted in him, and that the railroad company and its successors acquired no rights under the patent. (*Van Ness v. Rooney*, 160 Cal. 131, 116 Pac. 392.)

Messrs. Gunn, Rasch & Hall, Mr. Wm. Meyer and Mr. Frank W. Haskins, for Respondents, submitted a brief; *Mr. M. S. Gunn* argued the cause orally.

We cite the following cases sustaining the proposition that it will be presumed that the Act of Congress in question has been fully complied with: *St. Louis Smelting etc. Co. v. Kemp*, 104 U. S. 636, 20 L. Ed. 875; *Deseret Salt Co. v. Tarpey*, 142 U. S. 241, 35 L. Ed. 999, 12 Sup. Ct. Rep. 158; *Lake Superior etc. Co. v. Cunningham*, 155 U. S. 354, 39 L. Ed. 183, 15 Sup. Ct. Rep. 103; *Shaw v. Kellogg*, 170 U. S. 312, 42 L. Ed. 1050, 18 Sup. Ct. Rep. 632; *Creede & C. C. Mining etc. Co. v. Uinta Tunnel Min. etc. Co.*, 196 U. S. 337, 49 L. Ed. 501, 25 Sup. Ct. Rep. 266.

As the presumption that the Act of Congress was fully complied with is not challenged by the complaint, the appellant will not now be heard to say that the land embraced within the mining claims in controversy is mineral land and excluded from the grant made to the railroad company. The patent has the effect of a judgment, and the courts are not authorized to review the findings of the Land Department on issues of fact where the party seeking such review had notice and an opportunity to present his claim to the Land Department. There is a clear distinction between cases where the proceedings before the Land Department were *ex parte*, and cases involving proceedings before the Land Department where notice and an opportunity for a hearing were provided for in the legislation of Congress. (*Ross v. Stewart*, 227 U. S. 530, 57 L. Ed. 626, 33 Sup. Ct. Rep. 345.)

It is unnecessary to discuss the cases cited in the brief for appellant, further than to call attention to the fact that in none of them was it sought to have the decision of a question of fact by the Land Department, where there had been notice and an opportunity for a hearing before said department, reviewed.

While it has been decided many times by the supreme court of the United States and other courts that where, through fraud or mistake, a patent is issued to one party when it should have been issued to another, the other party may have the patentee declared a trustee of the legal title for him, it is essential to such relief that the appellant should show that, except for the error, fraud or imposition, he would have received the patent. (*Meyendorf v. Frohner*, 3 Mont. 282; *Murray v. Montana L. & M. Co.*, 25 Mont. 14, 63 Pac. 719; *Gebo v. Clarke Fork Coal Min. Co.*, 30 Mont. 90, 75 Pac. 859; *Pierson v. Loveland*, 16 Idaho, 628, 102 Pac. 340.) It follows that, as the appellant has made no application for a patent and there has been no decision, either by the Land Department or by any court with reference to the validity of the locations made, he has not shown himself entitled to a patent, and consequently cannot have the respondents declared trustees of the legal title for him. (*Cosmos Ex-*

ploration Co. v. Gray Eagle Oil Co., 190 U. S. 303, 47 L. Ed. 1064, 23 Sup. Ct. Rep. 692, 24 Sup. Ct. Rep. 860.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1905 and 1906 four quartz lode mining claims were located upon portions of lots 1 and 2, section 21, township 3 north, range 7 west, in Silver Bow county and within the Helena land district. Each of these lots is a fractional forty-acre legal subdivision. The land is within the territorial limits of the grant to the Northern Pacific Railroad Company and its successor, the Northern Pacific Railway Company, and in 1907 a patent was issued to the company for each of the two lots, including the land covered by these four mineral locations. The plaintiff is the successor of the original locators, and the defendants are the successors of the railway company. This suit was instituted to have the defendants declared to be trustees of the legal title to the ground covered by the mineral locations and to hold the same for the use and benefit of the plaintiff. In addition to the foregoing facts it is alleged in the complaint that plaintiff and his predecessors so far complied with the law that upon application plaintiff would receive a patent for each of his mining claims but for the fact that patent has already issued to the railway company for the same land. It is alleged that lots 1 and 2 are mineral in character, known to be such for forty years or more, and that in 1893 a patent was issued for the Homestake quartz lode mining claim located upon portions of these same two lots. It is further alleged that plaintiff and his predecessors have been in possession of these mining claims from the dates of their respective locations. The district court dismissed the complaint, and plaintiff appealed from the judgment.

It has been settled beyond controversy by decided cases too numerous to be cited: (1) That where patent has issued to one party when in equity and good conscience and by the laws enacted by the Congress upon the subject another should have received it, a court of equity will convert the holder of the legal

title into a trustee for the use and benefit of the true owner; (2) that the Land Department is a special tribunal created by law for the purpose of determining conflicting claims arising over the public land; (3) that a finding of fact by that tribunal is conclusive upon the courts, except for fraud or imposition which prevented the losing party from fully and fairly presenting his case or the officers of the tribunal from properly considering it; (4) that whether a particular parcel of land is mineral or nonmineral in character presents a question of fact dependent for its solution upon evidence *dehors* the record; (5) that, if the Land Department has jurisdiction, legal title passes when patent issues; (6) that, under Land Grant Act of July 2, 1864 (Chap. 217, 13 Stat. 365), patent to the Northern Pacific passes the legal title freed from the contingency of future discovery of minerals in the land conveyed; and (7) that a patent issued for land not open to entry under the Act by virtue of which it issued, is absolutely void.

The grant extending aid to the Northern Pacific conveyed certain odd-numbered sections, nonmineral in character, which were not reserved, sold or otherwise appropriated, and which were free from pre-emption or other claim or right at the date the line was definitely located. It is the contention of appellant that by reason of the mineral character of lots 1 and 2 they were never subject to the grant, and that in issuing patent for them the officers of the Land Department misapplied the law to existing facts, and that plaintiff is entitled to relief. It is not contended that any fraud or imposition was practiced or that the land was occupied at the time the line of road was definitely located, or that the land in dispute had been sold or otherwise appropriated, or that it was reserved, unless by the mineral reservation in the grant itself. Our investigation is narrowed to the inquiry: Does this complaint disclose that at the date patent issued to the Northern Pacific these lots were not subject to the grant by reason of their mineral character?

For thirty years succeeding the date of the grant there was no provision made for ascertaining the mineral or nonmineral

character of any tract within the limits of the grant, except by contest in the particular case between the railway company and a mineral claimant, and until the contest was finally determined and patent issued it was an open, controvertible question whether the particular land was nonmineral and subject to the [1] grant, or mineral and excepted from the grant. The Act of Congress approved February 26, 1895, provided for a classification of all lands within the grant in the Bozeman, Helena, Missoula, and Coeur d'Alene land districts, by a commission consisting of three members for each of these land districts. (28 Stats. at Large, 683.) The Act directed that the lands should be examined and then classified as mineral or nonmineral. Monthly each commission was required to file with the local land office its report in duplicate showing distinctly all lands classified as mineral and those classified as nonmineral. The register of the land office was required to publish notice of the classification, and anyone deeming himself aggrieved might file his protest against the acceptance of the classification and secure a hearing, in the nature of a contest, with the right of review on appeal to the General Land Office and the secretary of the interior. Section 6 of the Act provided that, as to the lands against the classification of which no protest was filed, the classification, when approved by the secretary of the interior, should be final except for fraud. In case protest was filed, the final ruling of the Land Department, after hearing, should determine the proper classification, and whenever any classification became final, the records of the general and local land offices were to be made to conform to such classification. Four years were allowed for the work, and the immediate effect of the Act was to suspend the issuance of patents to the railway company for lands situated in these land districts, until the classification was made and became final.

The Act contemplated a thorough examination and exploration of the lands to be classified. It commanded the commissioners to take into consideration the geological formation of adjacent lands, the presence or absence of mineral discoveries,

and the reasonable probabilities that the lands to be classified contained valuable mineral deposits because of their formation, location or general character. It was only after such examination as thus contemplated that a classification was authorized to be made. The proceeding was not *ex parte*. The United States and the Northern Pacific were the parties to the original grant, and the Act of February 26, 1895, was but supplementary to the granting Act. The government owning the land could dispose of it upon such terms as it saw fit, and, having granted certain lands, it reserved to itself the right to determine in its own way just what lands fell within the description of those conveyed. Each of these commissions was an agency of the government, through which it determined for itself just which legal subdivisions of these odd-numbered sections were non-mineral in character and subject to the grant, and which ones were mineral in character and excepted from the grant. It was free to fix any time it chose as the limit beyond which the controversy over the mineral or nonmineral character of these lands might not be waged, and it chose to make the classification when finally approved, conclusive except in case of fraud.

Prior to 1895, whenever the railway company applied for patent to lands by virtue of the grant, the Land Department was called upon to determine in the particular case whether the lands sought were nonmineral in character, and, having made a sufficient investigation its determination that the lands sought were nonmineral, became unassailable in all collateral proceedings except for fraud. But, instead of pursuing this policy of trying by piecemeal the question of the mineral or nonmineral character of these lands, the government provided in the Act of February 26, 1895, for one proceeding which should continue until the mineral or nonmineral character of every legal subdivision was determined; the entire proceeding resulting in a judgment of the Land Department that the lands classified as nonmineral were such in fact. To that proceeding the government and the railway company were made parties, but no one was foreclosed of any right. Every person, corporation, or com-

pany feeling aggrieved might intervene and have his interests, if any, protected. The mineral land commission was constituted a part of the Land Department, and all proceedings for the examination and classification of these lands were had and done by that department. The proceedings were in the nature of a contest in which all lands within the odd-numbered sections of the grant in these four land districts was the subject matter in dispute. If no third party intervened, the government and the railway company were the parties to the contest. If there was intervention, a special hearing was ordered for the determination of the third party claim, but in either event the proceeding culminated in a classification of the land which had the effect of a judgment of a special tribunal that the land was mineral or nonmineral, according as the evidence established the fact, and the question of fact thus found and established was not thereafter open to further litigation in any collateral proceeding except for fraud, even though subsequent development might disclose that some of the lands had been erroneously classified. Under the express terms of section 6 of the Act of 1895, there cannot be given any different effect to this blanket judgment than attached to the determination of the Land Department in a particular contest between the railway company and an adverse claimant under the laws in force prior to 1895.

In *Barden v. Northern Pac. R. Co.*, 154 U. S. 288, 38 L. Ed. 992, 14 Sup. Ct. Rep. 1030, decided prior to the enactment of the statute of February 26, 1895, it was held that the issuance of patent to the Northern Pacific for a particular tract of land under the Land Grant Act was a determination by the Land Department that the land was nonmineral in character, and in the absence of fraud such determination was conclusive upon the courts, without reference to the fact that mineral deposits might thereafter be discovered in the land. In other words, the patent set at rest for all time the question of the mineral or nonmineral character of the land. In our opinion, the classification under the Act of 1895 had the same legal effect. The classifica-

tion having been completed, the officers of the Land Department were not authorized or permitted thereafter to examine into the character of land for which patent was applied, but by reference to their records they determined from the classification made whether the particular land was mineral or non-mineral in character.

If lots 1 and 2 outside the limits of the Homestake claim were classified as nonmineral, and no protest was filed, or if protest was filed and, after hearing, was overruled, such classification, in the absence of fraud, became final, and settled for all time that the land was in fact nonmineral in character. Under these [2] circumstances, what consequences necessarily flow from the allegation in plaintiff's complaint that patent was issued to the Northern Pacific for the lands covered by the mineral location in lots 1 and 2?

Section 7 of the Act of February 26, 1895, provided: "That no patent or other evidence of title shall be issued or delivered to said Northern Pacific Railroad Company for any land in said land districts until such land shall have been examined and classified as nonmineral, as provided for in this Act, and such patent or other evidence of title shall only issue then to such land, if any, in said land districts as said company may be, by law and compliance therewith and by the said classification, entitled to," *etc.* (28 Stat. 686.)

It is the contention of respondents that the allegation that patent issued carries with it the necessary inference that the lands were examined by the mineral land commissioners for this district; that they were then classified as nonmineral; that the proper reports were filed, the required notice given; that either no protest was presented, or, if protest was presented, it was, after contest heard, overruled; that the classification became final; and that the plats and records had been made to disclose the facts long before these mining claims were located or patent issued to the railway company. The basis of this insistence is to be found in the language of section 7 above and in the decisions of the Supreme Court of the United States.

In *St. Louis Smelting & Refining Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875, it is said: "The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. It is this unassailable character which gives to it its chief, indeed, its only, value, as a means of quieting its possessor in the enjoyment of the lands it embraces."

If we indulge the presumption declared by the supreme court that the issuance of patent is in the nature of a judicial determination that every fact has been found which is necessary to entitle the patentee to the legal title to the land, the conclusion appears inevitable that the allegation in this complaint that patent issued to the Northern Pacific is tantamount to an allegation that the land in controversy was duly classified as non-mineral, and the classification approved before the mineral claims were located; and since the determination of the mineral or nonmineral character of the land presented a question of fact for decision by the Land Department, its judgment thereon is conclusive upon the courts in the absence of fraud.

Of course, if the mineral or nonmineral character of this land was open to investigation notwithstanding its classification, then the allegation in the complaint that it was and is mineral land is sufficient to show that the Land Department was without jurisdiction to convey it to the railway company; but, as we have observed before, if the classification did not finally determine the character of this land, the utmost that can be said of it is that it was an idle ceremony, and the Act of February 26, 1895, was a meaningless piece of legislation.

Counsel for appellant refers to the provision in section 3 of the Act of 1895 under which the patent to the Homestake claim [3] raised a presumption that lots 1 and 2 were mineral; but this provision is only one of numerous rules of evidence provided for the guidance of the mineral land commissioners. The fact that they found a patented mining claim upon portions of these lots only called upon them to begin their investigation of the character of the remaining portions, indulging a presumption that their investigation would disclose mineral deposits sufficiently valuable to justify exploitation. If, however, their examination convinced them that the remaining portions were nonmineral, the *prima facie* case was overcome at once, and their duty to classify them as nonmineral attached.

The cases relied upon by appellant announce the general rules which obtained prior to the Act of 1895 and subsequent to that date with respect to lands in districts other than those mentioned above; but they are not in point here, because in none of them had there been an adjudication as to the character of the land prior to application for patent, such as was afforded by the classification made in this instance.

We adopt the theory that the allegation in the complaint that patent issued to the Northern Pacific in 1907 necessarily implies that the land was classified as nonmineral, and is such in fact for all purposes of this case. Under this view plaintiff pleads himself out of court.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

McCORMICK, RESPONDENT, v. STIMSON ET AL., APPELLANTS.

(No. 3,833.)

(Submitted December 4, 1917. Decided December 17, 1917.)

[169 Pac. 726.]

Partnership—What Constitutes—Evidence—Insufficiency.**Partnership—Intention to Form—Evidence—Insufficiency.**

1. A partnership being a matter of agreement, express or implied, of the parties constituting it, a finding that defendants were partners, where there was nothing to show that they intended to assume those liabilities which the law attaches to a partnership, *held* unsupported by the evidence.

[As to what constitutes a partnership, see note in 115 Am. St. Rep. 400.]

Same—Ostensible Partner—Insufficient Evidence.

2. Where the evidence did not show that S. permitted himself to be held out as a partner of C., or that he or the person extending the credit knew he was being represented as such, but did disclose that S.'s financial responsibility did not enter into the transaction and that credit was given to C. individually, S. could not be held as an ostensible partner of C. as defined by section 5491, Revised Codes.

[As to intent as essential to creation of partnership, see note in Ann. Cas. 1916E, 440.]

Same—Who Liable as Partner.

3. Unless one is a partner in fact, or an ostensible partner, he cannot be held liable as a partner, under Rev. Codes, section 5492.

Appeal from District Court, Missoula County; Theo. Lenz, Judge.

ACTION by George McCormick against C. Stimson and A. L. Crawford. Judgment for plaintiff and C. Stimson appeals. Reversed and remanded.

Cause submitted on briefs of Counsel.

Mr. A. J. Lowary, for Appellants.

An agreement to contribute labor or property in consideration of receiving a part of the profits of some enterprise does not create a partnership, where such profits are paid as com-

On effect of agreement to share profits to create a partnership, see note in 18 L. R. A. (n. s.) 963.

pensation for the thing contributed. (*Denny v. Cabot*, 6 Met. (47 Mass.) 82; *Nantasket Beach Steamboat Co. v. Shea*, 182 Mass. 147, 65 N. E. 57; *Smythe's Estate v. Evans*, 209 Ill. 376, 70 N. E. 906; *Thornton v. McDonald*, 108 Ga. 3, 33 S. E. 680; *Hanthorn v. Quinn*, 42 Or. 1, 69 Pac. 817; *Rider v. Hammell*, 63 Kan. 733, 66 Pac. 1026; *McDonnell v. Battle House Co.*, 67 Ala. 90, 42 Am. Rep. 99; 30 Cyc. 383.)

“A person not, in fact, a partner, cannot be made liable to third persons on the ground of having been held out as a partner, except upon the principle of equitable estoppel, that he authorized himself to be so held out, and that the plaintiff gave credit to him.” (*Central City Sav. Bank v. Walker*, 66 N. Y. 424.) In the case of *Thompson v. First Nat. Bank of Toledo*, 111 U. S. 540, 28 L. Ed. 507, 4 Sup. Ct. Rep. 689, Mr. Justice Gray says: “No person can be fixed with liability on the ground that he has been held out as a partner, unless two things concur, viz.: First, the alleged act of holding out must have been done either by him or by his consent; and, secondly, it must have been known to the person seeking to avail himself of it. In the absence of the first of these requisites, whatever may have been done, cannot be imputed to the person sought to be made liable, and in the absence of the second, the person seeking to make him liable has not in any way been misled.”

Mr. John P. Swee, Mr. Albert Besancon and Mr. L. I. Wallace, for Respondent.

We call attention to the following authorities which have held business arrangements almost identical with this to be partnerships: *Berthold v. Goldsmith*, 24 How. (U. S.) 541, 16 L. Ed. 762; *Yeoman v. Lasley*, 40 Ohio St. 190; *Lomme v. Kintzing*, 1 Mont. 290; *Croft v. Bain*, 49 Mont. 484, 143 Pac. 960; *Flower v. Barnekoff*, 20 Or. 132, 11 L. R. A. 149, 25 Pac. 370; *Mudd v. Bates*, 73 Ill. App. 576; *Buchanan v. Edwards* (Tex. Civ.), 51 S. W. 33; *Atchison, T. & S. F. Ry. Co. v. Hucklebridge*, 62 Kan. 506, 64 Pac. 58; *Cogswell v. Wilson*, 11 Or. 372, 4 Pac. 1130; Story on Partnership, sec. 2; 3 Kent's Commentaries, 23.

“Where an agreement provides that one party shall furnish money for the purchase of stock, that the other shall purchase such stock and care for it for a certain time; and that it shall then be sold, and the profits or losses be divided in a prescribed manner, such agreement constitutes a partnership.” (*Mudd v. Bates, supra.*) In the case at bar it is not disputed that Stimson and Crawford were to share the profits, if any, derived from their business enterprise, and we therefore contend that they were partners in fact. (*Harvey v. Childs*, 28 Ohio St. 319, 321, 22 Am. Rep. 387.)

“One may estop himself from denying his liability as a partner where such relation does not exist in fact, by holding himself out as such, or by negligently permitting one to do so with whom he is engaged in business.” (*Rider v. Hammell*, 63 Kan. 733, 66 Pac. 1026.) In support of our contention of liability by estoppel, we also cite the following: *McMurtrie v. Guiler*, 183 Mass. 451, 67 N. E. 358; *Burritt v. Dickson*, 8 Cal. 113; *Dutcher v. Buck*, 96 Mich. 160, 20 L. R. A. 776, 55 N. W. 676; *Parchen v. Anderson*, 5 Mont. 438, 51 Am. Rep. 65, 5 Pac. 588; *Downie v. Savage*, 72 Wash. 164, 129 Pac. 1096; *Walker Bros. v. Skliris*, 34 Utah, 353, 98 Pac. 114; *Rider v. Hammell*, 63 Kan. 733, 66 Pac. 1026; *Wilson v. Roelofs*, 88 Ill. App. 480.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to recover \$52.50 alleged to be due plaintiff for work done by him, \$50 for pasturage furnished by H. O. Bakken, the claim for which was assigned to plaintiff, and \$50 for pasturage furnished by Arthur Reilly, the claim for which was assigned to plaintiff. It is sought to fasten liability upon defendant Stimson upon the theory that he and defendant Crawford were copartners. Crawford admitted his individual liability for each of the \$50 claims and for \$37.50 of the labor claim. Stimson denied liability altogether, and each defendant denied that any partnership existed. The trial resulted in a judgment against both for the full amount of the

claims, and from that judgment, and from the order denying his separate motion for a new trial, Stimson appealed.

1. Were Stimson and Crawford partners? Section 5466, Revised Codes, defines the term "partnership." Section 5467, provides: "A partnership can be formed only by the consent of all the parties thereto." In other words, the intention of the parties is a controlling consideration. (*Beasley v. Berry*, 33 Mont. 477, 84 Pac. 791.) The evidence is undisputed that Stimson purchased a herd of cattle paying therefor some \$22,000 and the freight from Norris to Ravalli; that he let these cattle to Crawford, who at his own expense was to feed and care for them for the term of three years; that the proceeds from the sales of any of these cattle were to belong to Stimson until he should be fully reimbursed for his entire investment, freight and taxes, and if, after that event, any profit was realized, it should be divided equally between them. Each of these parties testified that it was not his intention to form a partnership. There was not, according to the record, any property contributed to a common stock when this business venture was launched. The cattle belonged to Stimson and title was not to pass from him until he was fully reimbursed, and this contingency might never be realized.

A partnership results only from an agreement of the parties, [1] and though the agreement may be implied, as well as express, there must be evidence from which it can be said the parties consented to assume those liabilities which the law attaches to a partnership. There is no such evidence in this record. It was not the intention of either Stimson or Crawford that Stimson should be liable for any part of the expense of range riders or pasturage. Crawford agreed to bear this expense himself. Considering the rights and liabilities of Stimson and Crawford *inter sese*, they were not partners in fact. (*Hanrahan v. Freeman*, 35 Mont. 584, 90 Pac. 793; *Flathead County State Bank v. Ingham*, 51 Mont. 438, 153 Pac. 1005.)

2. May Stimson be held as an ostensible partner? Section [2] 5491, Revised Codes, provides: "Anyone permitting him-

self to be represented as a partner, general or special, is liable as such to third persons to whom such representation is communicated, and who, on the faith thereof, give credit to the partnership."

(a) There is not a scintilla of evidence that Stimson ever permitted himself to be held out as Crawford's partner, or ever knew that he was represented as such.

(b) There is not any evidence that plaintiff, Bakken, or Reilly knew that Stimson was being represented as Crawford's partner at the time the credit was extended; on the contrary, the evidence is fairly conclusive that not one of these parties knew that Stimson was actually or ostensibly interested in the business when his claim was contracted.

(c) The evidence is conclusive that the credit was not extended to a partnership but to Crawford individually. Stimson's financial responsibility did not enter into the transactions out of which these claims arose. There is not any evidence upon which Stimson can be held as an ostensible partner. Un-
[3] less one is a partner in fact, or an ostensible partner, he cannot be held liable as a partner. (Sec. 5492, Rev. Codes.)

The judgment as against defendant Stimson and the order denying his motion for a new trial are reversed and the cause is remanded, with directions to enter judgment in his favor for costs.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

COOPER ET AL., APPELLANTS, v. CITY OF BOZEMAN,
RESPONDENT.

(No. 3,834.)

(Submitted December 5, 1917. Decided December 18, 1917.)

[169 Pac. 801.]

*Cities and Towns—Special Improvement District—Creation—
Resolution of Intention—Insufficiency—Notice for Bids—
Contracts—Invalidity—Curative Statutes.*

Cities and Towns—Special Improvement Districts—Resolution of Intention—Insufficiency.

1. Under Chapter 89, Laws of 1913, before a special improvement district can be created, the city council must pass a resolution of intention to do so, give notice of its passage, etc. In an endeavor to create such a district, the council passed a resolution which proclaimed the creation of the district and an intention to assess the property liable for the cost of the improvement. *Held*, that the proceedings were void *in limine* for want of a proper resolution of intention.

Same—Insufficiency of Resolution—How not Cured.

2. Failure to pass a proper resolution of intention to create a special improvement district cannot be corrected by subsequent interpretation at the hands of the council, to the effect that the resolution passed was meant to operate as one of intention.

Same—Statutes—Liberal Construction—When not to be Indulged.

3. Where no work has been done under contracts for the installation of a special improvement, or warrants issued, the claim that a liberal and indulgent view of faulty proceedings in creating the district should be taken has no merit.

Same—When Contracts Void.

4. Contracts for the construction of special street improvements let without first giving ten days' notice for bids, and more than nine months after the award, *held* invalid as in contravention of the provisions of Chapter 89, *supra*, touching these subjects.

Same—Curative Statutes—When Ineffective.

5. The legislature has not the power to breathe the breath of life into a dead thing; hence defects of the character referred to in paragraph 1, *supra*, in proceedings necessary to confer jurisdiction upon the city council to create a special improvement district, under Chapter 89, Laws of 1913, were not cured by section 9, Chapter 142, Laws of 1915.

Appeal from District Court, Gallatin County, in the Ninth Judicial District; John A. Matthews, Judge of the Fourteenth District, presiding.

ACTION by Walter Cooper and another against the city of Bozeman for an injunction. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

Mr. E. F. Bunker, for Appellants, submitted a brief and argued the cause orally.

Mr. Geo. D. Pease and *Mr. H. D. Kremer*, for Respondent, submitted a brief; *Mr. Pease* argued the cause orally.

The legislature has general curative power over void municipal ordinances. (1 McQuillin on Municipal Corporations, p. 494; *Board of Education v. Hyatt*, 152 Cal. 515, 93 Pac. 117.) "Acts done under and by virtue of ordinances passed by a municipal corporation, and proceedings entered into by it, within the scope of its power to act, which are void or defective by reason of some irregularity, omission or want of compliance with the law in the passage of the ordinance, may be cured and rendered valid unless there be a constitutional inhibition by a subsequent act of the legislature, where the legislature originally had power to authorize the thing done." (2 McQuillin on Municipal Corporations, sec. 707, p. 1538; *Holladay v. San Francisco*, 124 Cal. 352, 57 Pac. 146; *United States Mtg. Co. v. Gross*, 93 Ill. 483; *Marion Water Co. v. Marion*, 121 Iowa, 306, 96 N. W. 883; *Emporia v. Norton*, 13 Kan. 569; *Flynn v. Little Falls Electric & W. Co.*, 74 Minn. 180, 77 N. W. 38, 78 N. W. 106; *State v. Starkey*, 49 Minn. 503, 52 N. W. 24; *Nottage v. Portland*, 35 Or. 539, 76 Am. St. Rep. 513, 58 Pac. 883.)

The legislature may confirm municipal ordinances and proceedings irregularly adopted. (*Hartzung v. Syracuse*, 92 Hun (N. Y.), 203, 36 N. Y. Supp. 521.) Thus while respondent contends the acts of the city council in creating said improvement district and entering into the contract with the Warren Construction Company for the paving of Tracy Avenue South in the city of Bozeman were legal, even though the same were irregular, or might be considered so, we contend that such irregular proceedings, if any, were fully cured by the legislature ac-

according to the provisions of section 9, Chapter 142, Laws of 1915.

MR. JUSTICE SANNER delivered the opinion of the court.

Appeal from a judgment of dismissal entered in consequence of an order sustaining a general demurrer to the appellants' complaint. The relief sought was an injunction to restrain the city of Bozeman from drawing warrants or levying taxes to pay for certain improvements contemplated pursuant to proceedings had in the creation of Special Improvement District No. 79 in that city; and the question presented is whether such proceedings, as narrated in the complaint, were sufficient.

The complaint shows the following: At a regular meeting of the city council held May 21, 1914, a petition for the creation of said district signed by the owners of thirty-two per cent of the frontage involved was presented, referred to the street committee and reported back favorably. At the same meeting there was proposed, passed by aye and no vote, and approved by the mayor, Resolution No. 578, which is entitled: "A Council Resolution creating a Special Improvement District No. 79 * * * for the purpose of constructing storm sewers, grading and paving * * * Tracy Avenue South * * * and declaring it to be the intention of the city council of said city to specially assess the entire cost and expense of making said improvements against the property bordering or abutting thereon," *etc.* In the body of this resolution it is declared: "Section 1. That there is hereby created a special improvement district to be known and designated as Special Improvement District No. 79 of the city of Bozeman, * * * for the purpose of making the improvements * * * hereinafter described * * * , and that it is the intention of said city council to make such improvements; Section 3. That the character of the improvements which are to be made within said Special Improvement District No. 79 is described as follows * * * ; Section 5. That the entire cost and expense of doing all of said work and making all of said improvements * * * shall be

borne and paid for by the property bordering or abutting on said Tracy Avenue South, *etc.*; Sec. 7. That Thursday the 18th day of June, 1914, at 7:30 o'clock P. M. * * * is hereby designated as the time and the council chamber * * * as the place when and where said city council * * * will hear and pass upon all protests that may be made against the making of said improvements or the creation of said special improvement district; Section 8. That the city clerk * * * is hereby instructed to give notice, as required by law, of the passage of this resolution * * * said notice shall be in substantially the following form: 'Notice of passage of Resolution creating Special Improvement District No. 79. * * * Notice is hereby given that * * * a resolution was duly passed and adopted by said city council, creating a Special Improvement District No. 79 of said city for the purpose of constructing storm sewers and grading and paving Tracy Avenue South * * * , and declaring it to be the intention of said city council to specially assess the entire cost and expense of making such improvements against the property bordering or abutting thereon, *etc.*' '' The notice provided for by the resolution was published and mailed to all the property owners within the district, and thereafter certain of said owners, including the appellants at bar, and representing nearly fifty per cent of the frontage involved, filed a timely protest which was overruled at the regular meeting of June 18. Thereupon it was moved, seconded and carried "that Council Resolution No. 578 be finally passed and adopted, that Special Improvement District No. 79 be created * * * , that the improvement particularly mentioned and described in Council Resolution No. 578 be ordered made in said Special Improvement District No. 79, and that assessments be made for the payment of the expense incurred * * * , in all respects as provided in said Council Resolution No. 578." It was then moved, seconded and carried that the clerk be instructed to advertise for bids for said work to be opened on July 2, 1914, but it was not provided how often or in what newspaper such advertisement should be published, although there

was at the time one daily and one weekly newspaper of general circulation published at Bozeman. This call for bids was never published; but the clerk on his own motion caused to be published in the daily newspaper in four successive issues, to-wit: July 3, 4, 5 and 7, 1914, a call for bids designating July 16 as the time for opening the same. Two bids were received, and on July 16 were opened, read and referred to the street committee of the council; later and at the same meeting that committee recommended the acceptance of the bid of the Warren Construction Company, which recommendation was adopted, and the mayor and clerk were thereupon directed to enter into a contract accordingly. On July 18 a suit was commenced in the district court of Gallatin county by one of the present plaintiffs, seeking an injunction to prevent the city "from proceeding with or acting under the contract with the Warren Construction Company which the city council directed its mayor and city clerk to enter into"; a temporary restraining order was issued on the 20th of July accordingly, and a hearing was had on the 28th of July; on the 1st of August, 1914, the temporary restraining order was dissolved, the application for injunction denied, and the plaintiff therein was given sixty days in which to file a bill of exceptions, but no such bill of exceptions was ever filed. Up to this time no contract for said work was entered into, nor was such contract entered into until April 29, 1915. Notwithstanding this, however, the city council on April 15, 1915, entertained a request from the Warren Construction Company for an extension of time in which to complete the work, and granted such extension to September 1, 1915. On May 12, 1915, thirteen days after the contract was let this suit was brought.

The statute under which the proceedings purport to have been conducted (Chapter 89, Laws 1913) provides: "Before creating any special improvement district * * * the city council shall pass a resolution of intention so to do * * * . Upon having passed such resolution the council must give notice of the passage of such resolution of intention * * * . At any time within fifteen days after the date of the first publica-

tion of the notice of the passage of the resolution of intention, any owner of property liable to be assessed for said work may make written protest against the proposed work or against the extent or creation of the district to be assessed, or both. * * *

When no protests have been delivered to the clerk of the city council within fifteen days after the date of the first publication of the notice of the passage of the resolution of intention, or when a protest shall have been found by said city council to be insufficient, or shall have been overruled, * * * or shall have been heard and denied, immediately thereupon the city council shall be deemed to have acquired jurisdiction to order the proposed improvements. * * *

Notice inviting proposals (for bids), and referring to the specifications on file, shall be published at least twice in a * * * newspaper, designated by the council for that purpose. * * *

The time fixed for the opening of bids shall be not less than ten days from the time of the final publication of said notice. * * *

Said proposals or bids shall be delivered to the clerk, * * * and said city council shall, in open session, publicly * * * declare the same * * * and may award the contract for said work or improvement to the lowest responsible bidder * * * .

But if said bidder neglects, fails or refuses for fifteen days after the notice of award to enter into the contract, then the city council, without further proceedings, shall again advertise for proposals or bids, as in the first instance, and award the contract for said work to the then lowest regular bidder. Should no bids be received in response to this second call * * * the council may again advertise for bids under the same proceedings at any time within six months from the time set for the last reception of bids, and let the contract to the then lowest bidder."

A comparison of these provisions with the proceedings had [1] and done will disclose that none of them were observed, and—taking the allegations of the complaint as true—that neither the present nor any contract for this work can be upheld. The proceedings were void *in limine* for want of a resolu-

tion of intention. By no reasonable construction can Resolution No. 578 be considered as such. It proclaims a fact accomplished, to-wit: the creation of the district; it expresses but one intention, to-wit: the intention to assess. True, it directs that notice be given to property owners for the purpose of inviting protests, but that notice, too, proclaims the same fact accomplished, the same intention to assess; and thus it puts the protests in the attitude of a sort of referendum rather than as a right to be met and satisfied before jurisdiction could be acquired. The record here discloses that the owners of at least eighteen per cent of the frontage involved neither petitioned nor protested. Had any considerable proportion of them protested, the proceedings would have been at an end; yet they might well have assumed that to protest against what they were notified had already been done would be a futile thing. That Resolution No. 578 was not a resolution of intention and that no jurisdiction to make the improvements can be founded upon it, was most elaborately shown in *Shapard v. City of Missoula*, 49 Mont. 269, 141 Pac. 544 *et seq.*, to which nothing need be added.

It is insisted, however, that jurisdictional foundation exists for the proceedings in question under the following *dictum* found in the *Shapard Case*: "If it appeared that the mayor and council had intended it [the original resolution] to operate as such [*i. e.*, as a resolution of intention] and this intention had been manifested by the passage of a subsequent resolution creating the district or ordering the proposed improvement to be installed, a wholly different situation would be presented. A mere informality in the resolution ought not to render the effort to acquire jurisdiction nugatory, and doubtless would not, if the subsequent proceedings in pursuance of it were in conformity with the statute." The answer is: No mere informality in the original resolution is here involved; the language of Resolution 578 does not permit the inference that at the time it was passed, the council designed it as a resolution of intention merely; the subsequent proceedings do not imply a construction of Resolution 578 as designed for a resolution of intention, any more than

they imply a consciousness on the part of the council that a mistake had been made which they then undertook to rectify; the motion to finally pass a resolution which had been finally passed, approved and promulgated twenty-eight days before, and ordering the work done, was not a resolution creating the district [2, 3] or ordering the proposed improvement; failure to take the initial step in such a way as to form the basis for jurisdiction cannot be corrected by subsequent interpretation of that step by the city council; and finally, the considerations which might call for a liberal and indulgent view of the proceedings, to-wit: that warrants had issued, or the work was done, are not present in this case.

Even if the initial steps had been valid, this contract could [4] not be upheld, because the ten days' notice for bids was not given, and because the contract was not entered into until more than nine months after the award. With relation to the notice it is said that only two days' publication was required by law, and that the time fixed for receiving bids allowed ten days after the second publication; this ignores the fact that the council could have required four publications, that the time must run from the last publication, and that the publication as made, with the time set, does not appear to have been authorized at all. The delay in entering into the contract is sought to be met by the assertion that there is nothing to show the Warren Construction Company had neglected or refused to enter into the contract within six months of the award, and that plaintiffs here cannot plead the delay because of the suit instituted on July 18, 1914; but this is unavailing, because the complaint clearly shows a *failure* to enter into the contract, because the suit constituted no obstacle to the making of the contract, and because such obstacle, if any was created, was removed on August 1, 1914, nearly nine months before the contract was made.

Finally, respondent invokes the provisions of section 9, Chapter 142, Laws of 1915, as curative of all the defects pointed out [5] in the complaint. For present purposes it may be as-

sumed that these provisions are ample to cure all mere irregularities, and that they cover with their protecting mantle all such failures as are here recorded when they occur after proceedings sufficient to confer jurisdiction; yet, certain it is that the legislature cannot breathe the breath of life into a dead thing. (*Davidson v. Wampler*, 29 Mont. 61, 74 Pac. 82; *McCillic v. Corby*, 37 Mont. 249, 17 L. R. A. (n. s.) 1263, 95 Pac. 1063; *Shapard v. City of Missoula*, *supra*; *Horsky v. McKennan*, 53 Mont. 50, 65, 162 Pac. 376.) Upon the showing made by the complaint, Improvement District No. 79 died a-borning for want of a resolution of intention, for want of jurisdiction to proceed any further or to make any mistakes that could be rectified by the curative Act.

The judgment appealed from is reversed and the cause is remanded, with directions to overrule the demurrer to the complaint.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied January 17, 1918.

OLD KENTUCKY DISTILLERY, RESPONDENT, v. STROMBERG-MULLINS CO., APPELLANT.

(No. 3,832.)

(Submitted December 4, 1917. Decided December 21, 1917.)

[169 Pac. 734.]

Claim and Delivery—Sales—Carriers—Title—Demand—Tender—Trial—Directed Verdict.

Trial—Undisputed Evidence—Directed Verdict—When Proper.

1. In a case tried by a jury where the evidence is undisputed and furnishes the basis for but one reasonable conclusion, the only question for determination is one of law, and the court may direct a verdict in favor of the party entitled to it.

Sales—Delivery to Carrier—Reservation of Title in Vendor—Claim and Delivery.

2. The rule that delivery of goods by the seller to a carrier for shipment to the purchaser is, in the absence of circumstances indicating a contrary intention, sufficient evidence of delivery to vest title in the purchaser is not controlling where the seller deviates from the contract in a substantial particular: as where the purchaser has directed them to be consigned to himself, by consigning them to some other person with the request that they be reconsigned to the purchaser.

[As to delivery of goods to carrier for shipment as delivery to purchaser, see note in *Ann. Cas.* 1916A, 1046.]

Same—Demand—Tender—When Unnecessary.

3. Where defendant in a claim and delivery action asserted the right to hold goods shipped to it with a request by the seller that it reconsign them to the purchaser, and thus to force the latter to pay a debt—assuming title in the purchaser and controverting that of plaintiff on the merits—demand for possession and tender were unnecessary, since the law does not require a useless thing.

Appeal from District Court, Silver Bow County; J. B. McClernan, Judge.

ACTION by the Old Kentucky Distillery against the Stromberg-Mullins Company. Judgment for plaintiff and defendant appeals. Affirmed.

Messrs. McCaffery & Tyler, for Appellant, submitted a brief; *Mr. Earl Genzberger*, of Counsel, argued the cause orally.

Grant became the owner of the whisky when the respondent accepted his order and approved it. Then the general rule of determining when title to property passes should be applicable. It is, that if a delivery of goods by a seller thereof to a common carrier for the transportation to the buyer fully performs the seller's contract, and he retains no control over them, such a delivery is a delivery to the buyer. (*Ann. Cas.* 1916A, 1046 n.; 11 *Ency. of Evidence*, p. 579.)

Grant did not designate what road or how he desired the goods delivered. Consequently if they were delivered in a manner common and customary among wholesalers to a common carrier of freight, such would be a delivery to Grant. (*Kelsea v. Ramsey & Gore Mfg. Co.*, 55 N. J. L. 320, 22 L. R. A. 415, 26 Atl. 907; *Finn v. Western R. Corp.*, 112 Mass. 525, 17 Am. Rep. 128.)

Grant had at least some property in the whisky. He had made advances in payment of it, and if he did not acquire the absolute title, his title was only subject to be interrupted during transit by the vendor. (*Dows v. Cobb*, 12 Barb. (N. Y.) 310; *Adams v. Bissell*, 28 Barb. (N. Y.) 382.) These goods were delivered to a third person, and the delivery was made without any reservation or control over the property. In that case, under the facts, the only person who would have a right to sue for the recovery of the goods would be Grant, the consignee. (*Sneec v. Prescott*, 1 Atk. 245.) So the purchaser to whom goods have been shipped in accordance with his order is the proper person to name as owner in an indictment for their theft. (*Walker v. State*, 9 Tex. App. 39.)

Messrs. Binnard & Rodger and *Mr. J. A. Poore*, for Respondent, submitted a brief; *Mr. Poore* argued the cause orally.

The title to the goods did not pass at the time of the delivery to the carrier, and consequently at the time Stromberg-Mullins Company took possession of the goods they belonged to the Old Kentucky Distillery. (*Mette & Kanne Dis. Co. v. Lowrey*, 39 Mont. 124, 129, 101 Pac. 966; *Mechem on Sales*, secs. 733, 736; 35 Cyc., pp. 193, 316).

The general rule that a delivery of goods to the common carrier constitutes delivery to the purchaser does not apply where it appears that the contract for the sale of the goods was not complied with. Before a delivery of goods to a carrier will constitute a delivery to the consignee so as to pass the title and make the consignee liable as for the goods sold and delivered, the goods must correspond with the order in quantity and quality, and in fact with the terms of the contract. (*Sutherland Medicine Co. v. Baltimore*, 81 Ark. 229, 98 S. W. 966; *Bray Clothing Co. v. McKinney*, 90 Ark. 161, 118 S. W. 406; *Wolf v. Dietzsch*, 75 Ill. 205; *Ellis v. Roche*, 73 Ill. 280; *Alsberg v. Latta*, 30 Iowa, 442, 445; *Corning v. Colt*, 5 Wend. (N. Y.) 254; *Steinhardt v. Bingham*, 90 App. Div. 149, 85 N. Y. Supp. 1044; 182 N. Y. 326, 75 N. E. 403; *Bruce v. Pearson*, 3 Johns. (N. Y.)

534.) When goods are shipped by some common carrier other than one designated by the buyer and delivered to such carrier, it is not a delivery to the buyer. (*Wheelhouse v. Parr*, 141 Mass. 593, 6 N. E. 787; *Wilson v. The Truxillo*, Fed. Cas. No. 17,841; *Hills v. Lynch*, 3 Robt. (N. Y.) 42; *Fleming v. Mills*, 5 Mich. 420.) And when a seller directs goods to a point at which the buyer does not receive goods, the delivery to the carrier is not a delivery to the purchaser. (*American Standard Jewelry Co. v. Witherington*, 81 Ark. 134, 98 S. W. 695.) When goods are purchased to be delivered at one point and delivered to a common carrier for shipment to the purchaser directed to another point, it is not a delivery to the purchaser. (*Heert v. Ridenour-Raymond Grocer Co.*, 48 Colo. 42, 139 Am. St. Rep. 259, 108 Pac. 968; *International Money Box Co. v. Southern Trust etc. Co.*, 93 App. Div. 309, 87 N. Y. Supp. 881.) Where the purchaser of goods directs that they be shipped to a certain person, but the seller sends them to another person, delivery to the carrier will not be considered a delivery to the purchaser. (*Woodruff v. Noyes*, 15 Conn. 335; *Woodbine Children's Clothing Co. v. Goldnamer & Son*, 134 Ky. 538, 20 Ann. Cas. 1026, 121 S. W. 444.) The vendor's title to property under a contract expressly providing that the delivery was to be made at a certain place is not divested until the delivery is made as agreed. (*Neimeyer Lumber Co. v. Burlington etc. R. Co.*, 54 Neb. 321, 40 L. R. A. 534, 74 N. W. 670.)

The fact that the goods were delivered to Stromberg-Mullins Co. prior to the commencement of the suit, and there being no evidence that they parted with them, they are presumed, in the absence of any evidence to the contrary, to be still in possession. (*Sullivan v. Girson*, 39 Mont. 274, 102 Pac. 320; sec. 7962, Rev. Codes, subd. 32.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action in claim and delivery brought by plaintiff to recover possession of five barrels of whisky of the alleged value of

\$465.11. At the close of the evidence the district court directed a verdict for the plaintiff. From the judgment entered thereon and from an order denying it a new trial, the defendant has appealed. The controversy arose out of the following facts:

The plaintiff's place of business is at Louisville, Kentucky. On January 11, 1913, David Grant, who was then conducting business as a saloon-keeper at Dillon, Montana, ordered from the plaintiff, to be shipped to him at Dillon, five barrels of Kentucky Dew whisky on or before March 1, 1913. The order was oral, being made through M. J. Green, a traveling salesman of the plaintiff, who was at Dillon at the time. Green made a memorandum upon an order blank such as was generally used by him for taking orders for liquors, specifying the quality, age, *etc.*, of the whisky desired by Grant, the price per gallon, and terms of payment. The price made to Grant was \$2.59 per gallon at Dillon, including the federal revenue tax and freight; Green agreeing that, if Grant should, upon receipt of the whisky at Dillon, be obliged to pay a greater amount of freight than that which was added to the selling price per gallon at Louisville (\$2.36, including the revenue tax), he would make up the difference. Grant agreed to pay the federal revenue tax of \$1.10 per gallon in cash at the date of shipment. The plaintiff was to draw on him for that amount. The balance of the purchase price was to be paid within four months, or, at Grant's option, within thirty days at a discount of four per cent. Green left with Grant a memorandum containing a detailed statement of the items going to make up the agreed price. In a letter of that date to plaintiff inclosing the order blank, Green requested plaintiff, if possible, to arrange to have the shipment included in "a pool car to Butte." Upon receipt of Green's letter the plaintiff approved the order, and a note was made upon the order blank of Green's request. Grant did not know that such an arrangement was intended or was made until he was notified of the receipt of the whisky by the defendant in Butte. The meaning of the expression "pool car" was explained by plain-

tiff's witnesses as follows: In order to reduce the charge for freight, by securing carload rates, which are less than the rates upon smaller shipments, two or more shippers from the same point to the same or different purchasers residing at a distant point by mutual consent pool or consolidate their separate shipments in order to make a full carload, each identifying the packages making up his shipment by appropriate tags or marks. If the shipments are intended for different purchasers residing at the same or near-by points, consignment of the car is made in the name of one of the shippers to one of the purchasers who, in accordance with a previous agreement with the several shippers, distributes the different shipments to the respective purchasers entitled to them, collecting from each his proportionate share of the freight. Upon inquiry plaintiff's traffic manager ascertained that the Kentucky Distilleries & Warehouse Company was consolidating a car for the defendant at Butte. He thereupon requested this company to obtain from defendant its consent to allow the Grant shipment to be included in this car. On January 20 this company wrote to defendant asking its permission to include a shipment of ten barrels from Grabfelder & Co., also of Louisville, to the Caplice Commercial Company at Butte, and of the five barrels from the plaintiff to Grant at Dillon. On January 27 it replied as follows: "On the 24th we telegraphed you to route the car of whisky ordered *via* Burlington, Northern Pacific at St. Paul. It will be satisfactory to us if you include the two shipments specified in yours of the 20th. Later we are in receipt of yours of the 24th and trust you will get the car off promptly according to instructions." The car reached Butte prior to February 11 consigned to the defendant; the plaintiff having in the meantime notified defendant that it contained the Grant shipment. On February 18 defendant wrote to plaintiff as follows: "We are in receipt of yours of the 15th in reference to five (5) barrels of whisky, for Dan Grant, sent in a car consigned to us by Kentucky Distilleries & Warehouse Co. You are mistaken when you state that this was a

pool car, as it was made up by us and was consigned and delivered direct to us. The five (5) barrels were placed in the car by the K. D. & W. Co. without solicitation on our part, and when they were received we decided to hold them awaiting a satisfactory answer from Mr. Grant in regard to a just account which we have carried against him for years. We inclose you herewith a copy of the letter which we wrote him on receipt of the shipment, and we think the matter can be safely left for him and us to settle between ourselves. As you can see from the inclosed copy, we are not unreasonable in either our position or our request." It also wrote Grant that his shipment had been received, and that it was being held pending his payment of a debt alleged to be due from him to defendant. On the same date Grant wrote to plaintiff: "I have received notice from the Stromberg-Mullins Co. that they have received five barrels of whisky from you marked to me, but that they are holding the same, claiming that I owe them and that they will hold the same until their account is settled. They have no legal claim against me and I look to you for the whisky I ordered, and if delivery cannot be had kindly return to me the money. The whisky was to be delivered at Dillon and I am not doing business with the Stromberg-Mullins Co. of Butte." On March 11 he telegraphed: "When are you going to deliver my 5 bbl. whisky? Answer." To this, plaintiff replied: "We have filed suit to secure immediate possession of our whisky." And on March 30 Grant wrote to plaintiff: "I am on my last bbl. of K. D. Do you think I will get my 5 bbl. within a short time? If not I will have to order elsewhere. Please let me hear from you by return mail." Upon the shipment of the whisky the plaintiff drew upon Grant for the amount of the federal tax, \$197.69. This Grant paid. Prior to the date of the purchase of the whisky in controversy Grant had made other purchases from the plaintiff, but none of them had been shipped in a pool car, and all of them had been consigned directly to him at Dillon.

Counsel for defendant have made several assignments of error in their brief, but it will not be necessary to notice them in

detail. The substantive question raised and submitted is whether the court erred in directing a verdict for the plaintiff.

The rule is well established by the decisions of this court that [1] when, in a case being tried to a jury, the evidence is undisputed and furnishes the basis for but one reasonable conclusion, the only question for determination is one of law, and that the court may direct the jury to render a verdict in favor of the party entitled to it. (*Consolidated etc. Min. Co. v. Struthers*, 41 Mont. 565, 111 Pac. 152; *Milwaukee Land Co. v. Ruesink*, 50 Mont. 489, 148 Pac. 396.)

As to the facts set out in the foregoing statement there is no material controversy. Neither is there any controversy that the plaintiff made verbal demand upon the defendant for delivery of the whisky and tendered to it the freight from Louisville to Butte at the carload rate. There is some conflict in the statements of the witnesses, however, as to whether the tender was made immediately before or immediately after the action was commenced. As will be pointed out later, in view of the position assumed by the defendant as to its rights in the premises, it is immaterial whether demand and tender were made at all. The [2] determining question to be decided is: In whom was the title to the whisky vested when the action was commenced? Counsel for defendant, assuming that by delivery to the carrier at Louisville through the Kentucky Distilleries & Warehouse Company for shipment to Grant plaintiff fully performed its obligation under the contract, insist that the title at once vested in Grant, and hence that plaintiff cannot maintain this action. To sustain their position they invoke the rule that the delivery of goods by a seller to a carrier for shipment to the purchaser, in the absence of circumstances indicating a contrary intention, is sufficient evidence of delivery to vest title in the purchaser. They say that under this rule the carrier becomes the agent of the purchaser to accept delivery for him, and that by delivery to the carrier the seller relinquishes all control over the shipment to the purchaser. The rule is elementary. (*Mette & Kanne Distilling Co. v. Lowrey*, 39 Mont.

124, 101 Pac. 966; *Willman Mercantile Co. v. Fussy*, 15 Mont. 511, 48 Am. St. Rep. 698, 39 Pac. 738; 1 Mechem on Sales, sec. 739.) In his work on Sales, Mr. Mechem, in section 739, says: "The effect of the delivery to the carrier under proper circumstances is thus not only to transfer the title, but also to fix ordinarily the time and place at which the title passes. With the title go the risk and liability, and the seller may recover the price though the goods never arrived, or, without his fault, are injured on the way."

The rule thus stated is recognized by the courts generally. If, however, the seller deviates from the contract in a substantial particular, as, for illustration, by delivering goods other than those ordered (*Mette & Kanne Distilling Co. v. Lowrey*, *supra*), or by directing them to a point at which the purchaser does not receive goods (*American Standard Jewelry Co. v. Witherington*, 81 Ark. 134, 98 S. W. 695), or when they are purchased for delivery at a point named, by failing to deliver them at that point (*Heert v. Ridenour-Raymond Grocery Co.*, 48 Colo. 42, 139 Am. St. Rep. 259, 108 Pac. 968), or by delivery to a carrier other than the one selected by the purchaser (*Woodbine Children's Clothing Co. v. Goldnamer*, 134 Ky. 538, 20 Ann. Cas. 1026, 121 S. W. 444), or when the purchaser has directed them to be consigned to a particular person, by consigning them to some other person (*Woodruff v. Noyes*, 15 Conn. 335), in none of these cases is delivery to the carrier delivery to the purchaser so as to vest title in him, unless, being informed of the deviation, the purchaser assents to it. The only inference permissible from the undisputed facts is that Grant purchased the whisky for consignment to himself at Dillon in the usual way. The contract was silent as to how the consignment should be made. Plaintiff was free to select the carrier to which it made delivery; but it was bound by its promise implied by the circumstances to make the consignment to Grant at Dillon. Instead of doing this, it chose the pool car arrangement, and made the consignment to the defendant, to be by it reconsigned

to Grant. This was evidently for its own benefit, *viz.*, to gain the advantage of the lower rate of freight in order to make good its guaranty to Grant that the price to him at Dillon should not exceed \$2.59 per gallon. Grant was therefore not vested with the title, and was clearly within his rights in refusing to recognize defendant as his agent for any purpose, though, as shown by its letter of February 18 to plaintiff acknowledging receipt of shipment and its notice to Grant, defendant assumed to hold the shipment for the latter pending a settlement of its claim against him.

Counsel contend that in any event it was the exclusive province of the jury to determine the ownership of the whisky under appropriate instructions. Under the uncontroverted evidence, this became a question of law for the court.

Counsel contend also that the court erred in failing to submit to the jury the question whether demand for possession was made by plaintiff before the action was commenced, and whether a tender was made of the freight. There is some conflict in the testimony as to whether formal written demand was made before the action was commenced; but there is no controversy that verbal demand was made by one of plaintiff's attorneys. This was sufficient. But, aside from this, the defendant, [3] assuming that Grant was the owner of the whisky, claimed the right to hold it for the purpose of forcing Grant to adjust a claim due to it. At the trial it asserted title in Grant in order to defeat recovery by the plaintiff; in other words, it controverted plaintiff's title on the merits. Under these circumstances a demand was not necessary. (*Bennett Bros. Co. v. Tam*, 24 Mont. 457, 62 Pac. 780; 34 Cyc. 1410). Neither, for the same reason, was tender necessary. Mr. Stromberg, the president of defendant, testified in effect that it was the purpose to hold the whisky for Grant in order to enforce a settlement of defendant's claim, notwithstanding a demand and tender had been made. A tender would therefore have been futile. The law does not require a useless thing. (*Stanford v. Coram*, 26

Mont. 285, 67 Pac. 1005; *Cassidy v. Slemons & Booth*, 41 Mont. 426, 109 Pac. 976.)

The verdict was properly directed. The judgment and order are therefore affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

ENGLISH, RESPONDENT, v. JENKS, APPELLANT.

(No. 3,836.)

(Submitted December 6, 1917. Decided December 21, 1917.)

[169 Pac. 727.]

Attorney's Liens—Foreclosure—Actions in Rem—Summons—Constructive Service—Judgment by Default—Jurisdiction—Presumptions—Record on Appeal.

Attorney's Lien—Foreclosure—Action for Money Judgment.

1. An attorney may have and state a cause of action for a money judgment against his client on account of services rendered and money advanced, notwithstanding his purpose is to foreclose an attorney's lien, the existence of which is open to doubt or denial.

[As to lien of attorneys, see notes in 51 Am. St. Rep. 251; Ann. Cas. 1916E, 387.]

Actions in Rem—Summons—Constructive Service.

2. Constructive service is effectual only in actions strictly *in rem*, in actions affecting plaintiff's personal status, and in actions to recover on money demands where and to the extent that some lien brings property into court as a *res* to answer for the judgment which may be entered.

Attorney's Lien—Waiver—What Does not Constitute.

3. Under Revised Codes, section 6422, an attorney's lien extends to the proceeds of the judgment, "in whosever hands they may come"; so that the mere fact that the judgment debtor's property was bought in under execution by plaintiff, and thus became the proceeds of the judgment obtained by him for his client, and took the place thereof, did not constitute a waiver of his lien.

Same—Action in Rem—Default Judgment—Constructive Service—Jurisdiction.

4. In a suit to foreclose an attorney's lien, the record on appeal from a judgment in his favor obtained by default on constructive

On constitutionality of statutes providing for attorney's liens, see note in 40 L. R. A. (n. s.) 529.

service of summons was silent as to the whereabouts, at the time the suit was brought, of the *res* (a dredge) to which the judgment was directed. *Held*, under paragraph 2, *supra*, that the trial court was without jurisdiction to render the judgment.

Judgment by Default—Jurisdiction—Presumptions—Record on Appeal.

5. Upon direct appeal from a judgment by default based upon constructive service, no presumptions in favor of jurisdiction may be indulged, but the facts which show jurisdiction must appear upon the face of the record.

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

ACTION by Mr. J. English against Shirley H. Jenks. From a judgment by default, defendant appeals. Reversed.

Messrs. Roote & Hopkins, for Appellant, submitted a brief; *Mr. H. C. Hopkins*, argued the cause orally.

Where the judgment-roll shows service is constructive, the presumption that the court had jurisdiction ceases, and the burden of establishing jurisdiction is thrown upon the party claiming under the judgment. (1 Freeman on Judgments, secs. 127, 131; *Palmer v. McMaster*, 8 Mont. 186-192, 19 Pac. 585; *Burke v. Inter-State Savings etc. Assn.*, 25 Mont. 315, 87 Am. St. Rep. 416, 64 Pac. 879; *Haupt v. Simington*, 27 Mont. 480, 483, 94 Am. St. Rep. 839, 71 Pac. 672; *O'Neill v. Potvin*, 13 Idaho, 721, 93 Pac. 21, 257; *Harpold v. Doyle*, 16 Idaho, 671, 102 Pac. 158, 162; Hughes on Procedure, sec. 172 F.) The recital in the judgment that service had been perfected cannot cure a defect which the record shows. (*Preston v. Walsh*, 10 Fed. 315, 325; *Burke v. Inter-State Savings etc. Assn.*, 25 Mont. 315, 322, 87 Am. St. Rep. 416, 64 Pac. 879; 1 Freeman on Judgments, sec. 125; 1 Bailey on Jurisdiction, sec. 172 F; *Galpin v. Page*, 18 Wall. (U. S.) 366, 21 L. Ed. 963; *Sibley v. Waffle*, 16 N. Y. 180; *Starbuck v. Murray*, 5 Wend. (N. Y.) 148, 21 Am. Dec. 172; *Pollard v. Wegener*, 13 Wis. 569; *Laney v. Garbee*, 105 Mo. 355, 24 Am. St. Rep. 391, 16 S. W. 831.)

That the plaintiff had waived his lien, see Weeks on Attorneys at Law, 2d ed., p. 763, sec. 375a; 1 Jones on Liens, sec. 231; *Cowen v. Boone*, 48 Iowa, 350; *German v. Browne*, 137 Ala.

425, 34 South. 985; *Wishard v. Biddle*, 64 Iowa, 526, 21 N. W. 15; *Goodrich v. McDonald*, 112 N. Y. 157, 19 N. E. 649.

The *alias* summons set forth in the judgment-roll was and is defective, in that it does not contain a general statement of the nature of the action, as required by section 6522 of the Revised Codes. (*People v. Greene*, 52 Cal. 577; *Sawyer v. Robertson*, 11 Mont. 416, 28 Pac. 456; *Atchison etc. R. Co. v. Nicholls*, 8 Colo. 188, 6 Pac. 512; *Sharman v. Huot*, 20 Mont. 555, 63 Am. St. Rep. 645, 52 Pac. 558; 32 Cyc., p. 437.) The provisions of the statute are mandatory. (*Dyas v. Keaton*, 3 Mont. 495, 498.)

Mr. A. B. Melzner and *Messrs. Canning & Geagan*, for Respondent, submitted a brief; *Mr. Patrick E. Geagan* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Appeal by Shirley H. Jenks from a judgment by default. Service of summons was by publication, and the contention is that the court below was without jurisdiction. Several reasons are suggested, one of which, however, will suffice.

The complaint, which names Jenks and Joseph P. Nolan as defendants, alleges, in substance, that the plaintiff—respondent here—performed certain professional services and expended certain moneys to the value and amount of \$7,525 as an attorney for Jenks in the prosecution of a suit by the latter against the British-Butte Mining Company; that the results of the suit were a judgment in favor of Jenks, upon which execution was issued and thereafter levied against all the real and personal property of said mining company; that at the sale under said execution plaintiff “bought all the said real and personal property in the name of and for the use and benefit of” Jenks, which property consists of eight particularly described mining claims, “all situate, lying, and being in the county of Silver Bow, state of Montana,” and one Risdon Electric Mining dredge (*locus* not stated); that no part of the moneys due plaintiff for said services has been paid, although demanded, and the plaintiff, under

section 6422, Revised Codes, "has and claims a lien upon said judgment and the real and personal property herein described" as the proceeds of such judgment; that Nolan claims some interest in such real estate, but such interest is subsequent and subject to plaintiff's lien, and was obtained with knowledge thereof. The prayer of the complaint is that plaintiff have judgment against Jenks for \$7,525, with interest, attorney's fees, and costs; "that said sum * * * and the interest thereon" be adjudged a lien upon the real and personal property above mentioned, prior and superior to any claim of Nolan's; that the defendants and all claimants under them be foreclosed of all right, claim or equity in said property; that the usual decree be made for the sale of said property, the proceeds to be applied to the payment of plaintiff's judgment; and "that plaintiff have judgment against the defendant Shirley H. Jenks for any deficiency that may remain" after such application.

It is argued that the complaint does not state a cause of action; but this is clearly wrong from a technical point of view. [1] One may have and state a cause of action for a money judgment, notwithstanding his purpose is to foreclose a lien, the existence of which is open to doubt or denial. This is often the case in suits to foreclose mechanics' liens; and we think the present complaint amply shows the plaintiff's right to recover for the value of the services rendered and the amount of money expended by him in behalf of Jenks. What appellant means to urge is doubtless this: That the complaint shows no lien, therefore no *res* to aid the court in obtaining jurisdiction through constructive service—which is a different matter, now to be considered.

Jenks was not served with summons personally and did not appear in the action. That he was a nonresident of the state, living at London, England, is shown by both the affidavit and [2] the order for publication of summons. It is familiar law that constructive service is effectual only in actions strictly *in rem*, in actions affecting the personal status of the plaintiff, and in actions to recover upon money demands where and to the

extent that some lien brings property into court as a *res* to answer for the judgment which may be entered. (*Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.) Obviously, therefore, no valid personal recovery was possible in this case against Jenks; and the vital question is whether, at the time this action was begun, the plaintiff brought into court, by virtue of a lien, property belonging to Jenks. The plaintiff claims that he did—presumably by virtue of his complaint seeking to foreclose an attorney's lien upon the proceeds of the judgment in *Jenks v. British-Butte Mining Company*, to-wit, the mining claims and the Risdon dredge. This may be doubted, in view of the fact that the complaint does not allege where the suit was brought, what court rendered the judgment, who levied the execution and conducted the sale thereunder, or where the sale was had. Passing that, however, the only lien claimed by the plaintiff and decreed for foreclosure is upon the dredge; so that the dredge is the only property which can now be claimed to have been brought into court to answer in place of the nonresident Jenks. Counsel insist that no lien upon this is disclosed because the [3] complaint “affirmatively shows that the plaintiff had waived any lien he may have had upon the dredge by buying in the property for his client * * * upon executions issued under the judgment against the British-Butte Mining Company.” This is a mistaken notion, based upon authorities which have no application under the law of this state. These authorities proceed upon the view, which obtains at common law, that an attorney's lien upon a judgment secured for his client is ended when, by the taking over of property or otherwise, the judgment is satisfied (*Goodrich v. McDonald*, 112 N. Y. 157, 19 N. E. 649); but under our statute (sec. 6422, Rev. Codes) the lien extends to “the proceeds of the judgment in whose ever hands they may come.” Hence the mere fact that the judgment debtor's property was bought in under execution and thus became the proceeds of the judgment obtained by the plaintiff for Jenks and took the place thereof, could not constitute a waiver of plaintiff's lien. It was to prevent such a penalizing

of the attorney who furthered the cause of his client, by protecting the judgment, that the statute in question came into being.

Passing upon these considerations, we come to others more [4] decisive. Where was the Risdon dredge, when sold under execution nearly two years before the beginning of the present suit? Where was it when this suit was brought? To these questions no answer or basis for necessary inference is given. It was personal property, therefore movable; and, so far as the complaint reveals, it may—if it was sold under execution in Montana—have been immediately removed beyond the state. The *alias* summons for publication, and the proceedings up to judgment, and the judgment itself, are likewise silent. The judgment, it is true, does describe the dredge as “now situated upon the Jessie placer mining claim, * * * in Silver Bow county, Montana”; but the warrant for this does not appear, nor does it shed any light upon the whereabouts of the dredge when the suit was brought. For all that we can tell, the dredge may have been outside of the state at that time and on the Jessie placer when the judgment was rendered, over eight months later. In short, the record does not affirmatively show that the *res* to which the judgment is directed was within the jurisdiction of the court when the suit was brought.

These omissions are fatal to this case, because the present [5] appeal is from the judgment itself. Where the attack is direct, and by appeal from a judgment by default based upon constructive service, there are no presumptions in favor of jurisdiction; but the facts which show jurisdiction must appear upon the face of the record. (*Burke v. Interstate S. & L. Assn.*, 25 Mont. 315, 87 Am. St. Rep. 416, 64 Pac. 879; *Haupt v. Simington*, 27 Mont. 480, 94 Am. St. Rep. 839, 71 Pac. 672; *Palmer v. McMaster*, 8 Mont. 186, 19 Pac. 585.)

As the dredge is the only *res* upon which the judgment attempts to act, and as the record fails to show that it was brought into court with the suit by virtue of the asserted lien, it follows

that jurisdiction does not appear, and the judgment must be reversed. So ordered.

Reversed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

HAMILTON, APPELLANT, v. BOARD OF COUNTY COMMISSIONERS, RESPONDENT.

(No. 4,134.)

(Submitted December 5, 1917. Decided December 24, 1917.)

[169 Pac. 729.]

*Injunction—Schools—County High Schools—Bonds—Taxation
—Constitution—Statutes—Partial Invalidity—Effect.*

County Bond—What Constitutes.

1. A county bond is one issued by the county to the payment of which the full faith and credit of the entire county are pledged; hence one which imposes an obligation upon a district less than an entire county is not a county bond.

Same—Taxation—Uniformity—County High Schools—Statutes—Constitution.

2. *Held*, that bonds authorized for county high school purposes by Chapter 167, Laws of 1917, are county bonds as defined above, and that therefore the provision of section 2109 thereof making taxable, for interest and redemption purposes, only property in the county outside the limits of those districts in which a district high school is maintained, is void under section 11, Article XII, of the Constitution.

Same—Statutes—Partial Invalidity—Rule.

3. Where, after eliminating a portion of an Act which is invalid, the remainder is complete in itself and capable of being executed in accordance with the apparent legislative intent, and the approval of the invalid portion was not an inducement to the enactment of those remaining, the statute thus remaining must be upheld.

[As to rules for the construction of statutes, see note in 12 Am. St. Rep. 826.]

Same—County High Schools—Partial Invalidity of Act—Effect.

4. *Held*, under the above rule, that Chapter 167, Laws of 1917, after rejecting the clause mentioned in paragraph 2 above as invalid, pre-

sents a complete valid and workable Act for the financing of district high schools.

Statutes—Void Statute not a Law.

5. A void statute is not a law, imposes no duty, confers no authority, affords no protection, and no one is bound to observe it.

Appeal from District Court, Fergus County; H. Leonard De Kalb, Judge.

Surr by Robert E. Hamilton to enjoin the Board of County Commissioners of Fergus County from delivering certain bonds. From a judgment dismissing the complaint and dissolving the temporary injunction, plaintiff appeals. Affirmed.

Messrs. Blackford & Huntoon and Mr. Frank A. Wright, for Appellant, submitted a brief; Mr. W. M. Blackford argued the cause orally.

Mr. Stewart McConochie, Mr. Ralph J. Anderson, Mr. Merle C. Groene and Mr. Rudolf von Topel, for Respondent, submitted a brief; Mr. Anderson argued the cause orally.

It is only the last paragraph of the Act of 1917 that is in violation of the provisions of the Constitution, and if this paragraph were stricken from the law, the Act of 1917 would still remain a law that could be used and would be complete and workable in every respect. We submit that this paragraph is therefore capable of separation from the rest of the Act, and that the remaining portion is a valid and existing law. (*Northwestern Mut. L. Ins. Co. v. Lewis & Clarke County*, 28 Mont. 484, 497, 98 Am. St. Rep. 572, 72 Pac. 982; *Hill v. Rae*, 52 Mont. 378, 389, 158 Pac. 826; *State v. Cudahy Packing Co.*, 33 Mont. 179, 114 Am. St. Rep. 804, 8 Ann. Cas. 717, 82 Pac. 833; *Dunn v. City of Great Falls*, 13 Mont. 58, 31 Pac. 1017; *State v. Aetna Banking etc. Co.*, 34 Mont. 379, 87 Pac. 268; *State v. Stewart*, 53 Mont. 18, 161 Pac. 309; *In re Gerino*, 143 Cal. 412, 66 L. R. A. 249, 77 Pac. 166; *Ballentine v. Willey*, 3 Idaho, 496, 95 Am. St. Rep. 17, 31 Pac. 994; *State v. Candland*, 36 Utah, 406, 140 Am. St. Rep. 834, 24 L. R. A. (N. S.) 1260, 104 Pac. 285; *Common-*

wealth v. Anselvich, 186 Mass. 376, 104 Am. St. Rep. 590, 71 N. E. 790.) The separability of the 1917 Act seems to be the only point at issue in the case. A part of a section of a statute may be held unconstitutional, as sections of laws are often artificial. (*Loeb v. Columbia Tp. Trustees*, 179 U. S. 472, 45 L. Ed. 280, 21 Sup. Ct. Rep. 174; *Berea College v. Kentucky*, 211 U. S. 45, 53 L. Ed. 81, 29 Sup. Ct. Rep. 33; *Chicago B. & Q. R. Co. v. Jones*, 149 Ill. 361, 41 Am. St. Rep. 278, 24 L. R. A. 141, 37 N. E. 247; *Nathan v. Spokane Co*, 35 Wash. 26, 102 Am. St. Rep. 888, 65 L. R. A. 336, 76 Pac. 521.)

If the Act of 1917 is unconstitutional and invalid in its entirety, the present high school bond issue before the court is nevertheless valid. Where a law is passed as amendatory of existing law or as a substitute for an existing law but repealing the existing law, the repealing clause fails with the other provisions of the Act. (*People v. De Blaay*, 137 Mich. 402, 4 Ann. Cas. 919, 100 N. W. 598.) The law of 1917 contains a general repealing clause, and repeals only such laws as are in conflict therewith. It is a rule to which there is no exception that when an Act containing only a general repealing clause fails by reason of being unconstitutional, the repealing clause also fails, because it is no law, and therefore it is in conflict with no other law. (36 Cyc. 1098; *Ex parte Clary*, 149 Cal. 732, 87 Pac. 580; *Orange County v. Harris*, 97 Cal. 600, 32 Pac. 594; *People v. Fleming*, 7 Colo. 230, 3 Pac. 70; *Pitkin County v. Aspen First Nat. Bank*, 6 Colo. App. 423, 40 Pac. 894; *Board of Education v. Hunter* (Utah), 159 Pac. 1019; *Santa Cruz R. P. Co. v. Lyons*, 133 Cal. 114, 65 Pac. 329; *In re Rafferty*, 1 Wash. 382, 25 Pac. 465.)

An unconstitutional law is no law, confers no authority upon anyone, affords no protection and may be disregarded with safety. (*Threadgill v. Cross*, 26 Okl. 403, 138 Am. St. Rep. 964, 109 Pac. 558; *State v. Candland*, 36 Utah, 406, 140 Am. St. Rep. 834, 24 L. R. A. (n. s.) 1260, 104 Pac. 285; *State ex rel. Stevenson v. Tufty*, 20 Nev. 427, 19 Am. St. Rep. 374, 22 Pac. 1054; *Felix v. Board of County Commrs.*, 62 Kan. 832, 84

Am. St. Rep. 424, 62 Pac. 667; *Little R. & Ft. S. Ry. v. Worthen*, 120 U. S. 97, 30 L. Ed. 588, 7 Sup. Ct. Rep. 469; *Bennett v. Vallier*, 136 Wis. 193, 128 Am. St. Rep. 1061, 17 L. R. A. (n. s.) 486, 116 N. W. 883; *Norton v. Shelby Co.*, 118 U. S. 425, 30 L. Ed. 178, 6 Sup. Ct. Rep. 1121.)

The courts make a distinction in determining whether or not laws which are unconstitutional in part are capable of separation depending upon what is the primary object or purpose of the law. They are more liberal in deciding that revenue laws are capable of separation than many other classes of laws. (36 Cyc. 982; *Nathan v. Spokane County*, 35 Wash. 26, 102 Am. St. Rep. 888, 65 L. R. A. 336, 76 Pac. 521; *Little R. & Ft. S. Ry. v. Worthen*, *supra*; *State v. West Duluth Electric Co.*, 76 Minn. 96, 57 L. R. A. 63, 78 N. W. 1032; *State v. Fleming*, 70 Neb. 523, 97 N. W. 1063; *Northwestern Mut. L. Ins. Co. v. Lewis & Clarke County*, 28 Mont. 484, 98 Am. St. Rep. 572, 72 Pac. 982; *Pump v. Lucas County Commrs.*, 69 Ohio St. 448, 69 N. E. 666; *Peacock & Co. v. Pratt*, 121 Fed. 772, 58 C. C. A. 48.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1889 a county high school was established in Fergus county and located at Lewistown. Subsequently each of eleven school districts outside the Lewistown district instituted a high school course in its district school, and has since maintained what is denominated a district high school. Early in 1917 the trustees of the county high school requested the board of county commissioners to call an election, and to submit the question whether bonds in the sum of \$100,000 should be issued to provide funds necessary to erect an addition to the county high school building. The election was held on April 28; the bonds were authorized and subsequently sold, but before they were delivered this suit was instituted to enjoin their delivery. From a judgment dismissing the complaint and from an order dissolving a temporary injunction, plaintiff appealed. It is the

contention of appellant that the county commissioners proceeded contrary to law in submitting the bond question.

Chapter 167, Laws of 1917, provides among other things: "The question of the issuance of such bonds shall be submitted to the electors only who reside outside of such district or districts maintaining high schools." If this is a valid statute, the board ignored the law in submitting the question to the qualified electors of the entire county, instead of limiting it to those only who resided outside the eleven districts in each of which there is a district high school.

In 1913 the legislature enacted a complete code of laws "for the establishment and maintenance of a general, uniform, and thorough system of public free schools" in this state. (Chap. 76, Laws 1913.) Among other things it provided for elementary schools and for county high schools. By section 2109 of the School Code, a county in which a county high school has been established is authorized to issue county bonds to provide funds to purchase or construct necessary buildings for such county high school. By Chapter 167 above, this section 2109 was amended so as to give it a somewhat broader application, but otherwise the provisions of the original section and the amended section are substantially the same.

The determination of this controversy depends primarily upon the answer to the inquiry, Are the bonds authorized by the election held April 28 county bonds which evidence an indebtedness or liability of the entire county? If they are county bonds, then the question whether they should be issued must have been submitted to the qualified electors of the entire county, for the purpose for which they were to be issued is a single purpose within the meaning of that term as employed in the Constitution. Section 5, Article XIII, of the Constitution, reads as follows: "No county shall incur any indebtedness or liability for any single purpose to an amount exceeding ten thousand dollars (\$10,000) without the approval of a majority of the electors thereof, voting at an election to be provided by law." This language is susceptible of but one meaning. It requires

the approval of a majority of the electors of the entire county who vote at the election to authorize an issue of county bonds in an amount exceeding \$10,000 for any single purpose. A [1, 2] county bond is one issued by the county, and to the payment of which the full faith and credit of the entire county are pledged. The correctness of this definition was recognized in *Edwards v. Lewis and Clark County*, 53 Mont. 359, 165 Pac. 297. A bond which imposes an obligation upon a district less than an entire county cannot be denominated a county bond in any proper sense of the term.

If these bonds are not county bonds, then the legislators failed to express their intention and failed to make any valid provision for their payment.

(a) Throughout the School Code wherever county high school bonds are mentioned, they are referred to as county bonds. For instance, by section 2109, and by the same section as amended, the question to be submitted is whether "*county bonds*" shall be issued. Section 2110 of the same Code, referring to bonds issued for county high school purposes, provides: "Said bonds shall be paid, principal and interest, in the manner provided for the payment of other county bonds."

(b) The only provision for the payment of county high school bonds is found in paragraph 2 of section 2109 of the School Code, and in the corresponding paragraph of the same section as amended by Chapter 167 above. The county commissioners are commanded to levy a tax each year "upon the taxable property in the county for the interest and redemption of said bonds"; that is to say, they must provide by taxation for the payment of the interest each year, and ultimately they must provide by the same means for a sinking fund to discharge the principal at maturity. If the statute concluded with this paragraph, it would not be open to the criticism made upon it; but paragraph 3 of the original section, and the corresponding paragraph in the same section in its amended form, provides: "The limitations on the indebtedness to be created by the issuance of bonds in such cases, and the method of levy, assessment and

collection of taxes for the payment of bonds so issued, hereinabove set forth, shall apply only to so much of the said county as shall not be included in the school district or school districts which shall continue to maintain district high schools as herein provided." As applied to the facts of this particular case, that paragraph would read as follows: The county commissioners shall annually levy a tax for the interest and redemption of said bonds only upon the taxable property in the county outside the limits of the eleven districts, in each of which a district high school is maintained.

It is conceded by both parties to this litigation that this provision is unconstitutional. Section 11, Article XII, of the state Constitution, provides: "Taxes shall be levied and collected by general laws and for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." The territorial limits of the authority of the board of county commissioners are co-extensive with the territorial limits of the county itself, and any tax levied by that board must be uniform upon the same class of subjects throughout the county. In so far as the statute directs that the tax be levied upon property in a portion of the county only, it is invalid.

We cannot assume that it was the intention of the legislature to provide for the issuance of county high school bonds and at the same time make no provision for their payment. Section 8, Article XII, of the Constitution, declares that private property shall not be taken or sold for the corporate debts of a public corporation, but the legislature shall provide by law for the payment thereof by taxation of all private property, not exempt, within the limits of the territory over which such corporation has authority. Every consideration leads to the conclusion that these bonds are county bonds evidencing an indebtedness and liability of the entire county, to the payment of which the full faith and credit of the county as a unit are pledged; that paragraph 2 of section 2109 was intended to provide adequate means for their payment, and that the provisions in

paragraph 3 of the section quoted above are unconstitutional and void.

Paragraph 3 cannot be reconciled with other provisions of the School Code. For instance, section 2104 provides: "All eligible pupils in the county are entitled to attend the county high school, and it shall be the duty of the board to provide accommodations for such pupils." In other words, any eligible pupil in any one of the eleven districts which maintains a district high school is entitled to attend the county high school, and the trustees are required to provide accommodations for such as do attend; but if paragraph 3 of section 2109 and section 2112 be upheld, the property in those eleven districts is entirely exempt from taxation to provide the accommodations at the county high school, or defray the expense of maintaining such school. Furthermore, the provisions of section 2112 are contradictory of the provisions of paragraph 3. As already observed, paragraph 3 seeks to exempt from taxation for county high school bonding purposes all property of the district which maintains a district high school; whereas section 2112 provides: "When such district high school has been fully established as an accredited high school, such district shall thereafter be exempt from further levy by the county high school board, except for bonded indebtedness for free county high school purposes."

Is it possible, then, to eliminate the invalid provisions from [3] paragraph 3 without destroying the entire statute? The rule applicable in such cases is stated in *Dunn v. City of Great Falls*, 13 Mont. 58, 31 Pac. 1017, as follows: "If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained." (*Hill v. Rae*, 52 Mont. 378, L. R. A. 1917A, 495, 158 Pac. 826; *State ex rel. Evans v. Stewart*, 53 Mont. 18, 161 Pac. 309.)

There cannot be any difficulty experienced in executing the [4] remaining portion of the statute with these objectionable provisions eliminated. The enactment will still be complete in

itself, and the rejection of the invalid portion will not necessarily destroy the plan for district high schools. It does not appear to us that the several portions of the Act are so closely related that one would not have been enacted without the others, or that the approval of the invalid portions was an inducement to the enactment of the others. Our conclusion is that the unconstitutional portions of paragraph 3 may be disregarded entirely without impairing the remaining provisions of the statute.

There is not any merit in the contention that the commissioners should have proceeded under paragraph 3 of section 2109 even though it is unconstitutional. An unconstitutional statute [5] is void, and a void thing is as nothing. A void statute is not a law. It imposes no duty, confers no authority, affords no protection, and no one is bound to observe it. In contemplation of law it is as inoperative as though it had never been passed. The county commissioners properly disregarded the provisions of paragraph 3 and proceeded under paragraph 2 of section 2109 as amended.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

FLYNN, APPELLANT, v. BEAVERHEAD COUNTY,
RESPONDENT.

(No. 3,839.)

(Submitted December 6, 1917. Decided December 28, 1917.)

[170 Pac. 13.]

*Counties—Roads—Condemnation Proceedings—Compensation—
Limitations of Actions—Statutes—Contracts.*

Counties — Roads — Condemnation Proceedings — Compensation — Limitations of Actions.

1. *Held*, that the subject matter of an action against a county by which it was sought to obtain compensation for land taken for road purposes under an agreement the consideration for which failed was

not a "claim" against the county, within the meaning of either section 2945, Revised Codes, an action on which is barred if not brought within one year after its accrual, or section 6450a, which requires action within six months after rejection thereof.

Same—Roads—Petition—Offer and Acceptance—Contract.

2. The petition for the establishment of a county road signed by plaintiff, and his agreement in writing specifying the terms and conditions upon which he would grant a right of way over his land, were one instrument and constituted his offer, which, when accepted by the county, completed the agreement.

Contracts—Offer and Acceptance.

3. To complete a contract, the offer must be accepted in the same terms in which made.

Appeal from District Court, Beaverhead County; Wm. A. Clark, Judge.

ACTION by Thomas Flynn against the county of Beaverhead. Judgment of nonsuit in favor of defendant, and plaintiff appeals. Reversed and remanded.

Messrs. Norris, Hurd & Collins, for Appellant, submitted a brief; *Mr. Geo. E. Hurd* argued the cause orally.

It was argued by respondent in the lower court that appellant consented to the taking of his land by the county for road purposes and may not now be heard to complain. It is true that appellant did consent, under conditions, to donating his land as a part of a right of way to be occupied by the road as petitioned for, but he did not consent to donating his land to be used as a part of the highway as finally laid out by the board. The board was given jurisdiction to open the road up Blacktail Deer Creek by the petition, and the board was limited to the route described in the petition except as to unimportant deviations. (Elliott on Roads and Streets, 2d ed., sec. 382; *Crowley v. Board of Commrs.*, 14 Mont. 292, 36 Pac. 313; *Packard v. Androscoggin County Commrs.*, 80 Me. 43, 12 Atl. 788.) Appellant did not give his consent to the route as finally opened, and no agreement on his part to donate his land for the last-mentioned purpose was made by him. In the case of *Pagel v. Fergus County Commrs.*, 17 Mont. 586, 44 Pac. 86, this court held that consent of a land owner to open a private road across

his land did not give the board jurisdiction to lay a public road over his property. Logically, that rule is applicable here, in that the agreement of appellant to donate his land for a certain road may not be construed as a consent to make that donation to a road substantially different as to route, *etc.* The same rule is stated by the supreme court of California in the case of *Graham v. Bailard*, 157 Cal. 96, 106 Pac. 215. If the lower court based its ruling on the motion of respondent for a nonsuit, upon the ground that the cause of action of appellant is barred by reason of his consent that the county might use his land for road purposes, then we submit that this ruling is contrary to the doctrine above stated and constitutes error.

Mr. J. B. Poindexter, Attorney General, *Mr. Roy S. Stephenson* and *Mr. Harold Pease*, for Respondent, submitted a brief; *Mr. Frank Woody*, Assistant Attorney General, argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Plaintiff appeals from a judgment rendered against him after the court had granted defendant's motion for a nonsuit.

The facts out of which this controversy arises are stated at length in *Flynn v. Beaverhead County*, 49 Mont. 347, 141 Pac. 673. In that case we held that ejectment was not a remedy available to plaintiff under the circumstances, but, concluding the opinion, we remarked: "It is not meant by anything here said that the plaintiff is wholly without remedy. He may not thus be deprived of his land without full compensation for it. Upon the plainest principles of justice, the board of commissioners should ascertain the amount to which he is entitled and pay him. In the absence of favorable action on its part, he may maintain his action for it as he at first attempted to do."

Plaintiff then commenced this action to recover compensation [1] for the land taken by the county. Among other defenses interposed, the county pleaded the bar of certain statutes of

limitations, *viz.*: Sections 2945 and 6450a, Revised Codes. These sections provide:

“Sec. 2945. No account must be allowed by the board unless the same is made out in separate items, the nature of each item stated, and be verified by affidavit, showing that the account is just and wholly unpaid; and if it is for official services for which no specified fees are fixed by law, the time actually and necessarily devoted to such service must be stated. Every claim against the county must be presented within a year after the last item accrued.

“Sec. 6450a. * * * 2. Actions for claims against a county, which have been rejected by the county commissioners, must be commenced within six months after the first rejection thereof by such board.”

It will be observed that these sections have to do with claims or accounts against a county, the general nature or character of which is indicated in section 2945. That the subject matter of this litigation is not such as to give rise to a claim within the meaning of that section is apparent.

At the time the proceedings were taken to establish the road in question, sections 1390–1410, Revised Codes, were in force, were controlling and were exclusive. They gave full recognition to the provisions of section 14, Article III, of the Constitution, that private property shall not be taken for public use without just compensation, and were designed to furnish ample means by which a county could procure a necessary right of way for public road purposes. (a) A land owner might consent in writing to give the right of way over his premises (sec. 1395), and upon the execution and delivery of a proper conveyance, title passed to the county (sec. 1406). (b) He might decline to present the land to the county and claim damages by way of compensation (sec. 1395), in which event, upon the return of the viewers' report, the commissioners were required to give notice, conduct a hearing and ascertain and declare the amount of damages awarded (sec. 1397). If the award was accepted and the proper conveyance made, the county was free to declare

the road a public highway so far as that land owner was concerned (sec. 1398). (c) If the award was not accepted within thirty days it was deemed rejected, and the county was remitted to its remedy by condemnation proceedings (sec. 1400). A rather wide discretion was lodged in the board. It was not essential that the compensation to a nonconsenting land owner be paid in money. The consideration for the right of way over his premises might consist of advantages to accrue to him from the opening of the new road over a particular route (sec. 1399).

As already observed, these provisions were exclusive. They furnished adequate means, and the only means, by which the county could procure a right of way for public road purposes in proceedings taken under the general highway statutes above. In contemplation of law the nonconsenting land owner received compensation for his land prior to or at the time he relinquished it to the county. There could not arise any possible circumstances under which he could have a claim against the county for his compensation, within the meaning of section 2945. In proceedings to establish a new road, the county was the moving party from the time a sufficient petition was presented. The Constitution and statutes imposed upon it the duty to pay or provide just compensation for the necessary right of way.

It is plaintiff's contention that he did not consent to give the right of way for the road in question, but that he demanded compensation which he deemed adequate. He reduced his offer to writing and submitted it to the board with the petition bearing his signature. The writing has been lost, but according to plaintiff's testimony, the consideration for his granting the right of way over his land was that the road be established in its entirety over the route described in the petition and that the county fence on both sides of the right of way across his place. He insists that his offer was accepted by the board, the road ordered established and opened, that it was actually opened across his land and the right of way fenced by the county, but that the county then refused to open it over the remaining portion of the route described in the petition, thereby defeating

the principal object which plaintiff and the other petitioners had in view in seeking to have the new road established; that the road petitioned for would have furnished a direct route to the county seat over a water grade, avoiding the longer distance and difficult grades of the old road; that the road in the condition in which it was left is longer and less advantageous even than the old road, and furnishes no compensation whatever to plaintiff for the right of way across his land. Plaintiff insists also that the fence furnished by the county is inferior in grade to the fence described by him in his offer to the county. According to plaintiff's theory, the county failed and now refuses to make the compensation agreed upon and upon the faith of which agreement he let the county into possession of the right of way over his premises. This does not give rise to a claim within the meaning of section 2945, but for the breach of the agreement plaintiff may maintain his action for damages in the way of compensation.

The legislature never contemplated that the county would enter into a solemn compact and then deliberately violate it, and therefore made no provision for a case of this character. It is *sui generis*; but the county has the use and occupation of the right of way over plaintiff's land and will not be heard to say that through its breach of faith it has placed the plaintiff in a position where he is remediless. The Constitution guarantees to him full compensation for the property taken, and the language of this court quoted from the former opinion above, is sufficiently explicit to indicate that the remedy he is pursuing is available.

Section 2894 refers to an outright purchase of property for county purposes, but it has no application to the acquisition of a right of way under the general highway law.

The testimony introduced by plaintiff establishes a *prima facie* case, and it is evident that the nonsuit was granted upon the theory that plaintiff's cause of action is barred by the provisions of sections 2945 and 6450a; but, as neither section is applicable, the ruling was erroneous.

According to plaintiff's theory, the road petition when signed [2] by him and his writing specifying the terms and conditions upon which he would grant the right of way are to be treated as one instrument and, so far as he is concerned, as constituting the offer on his part, which, when accepted by the county, completed the agreement. If the testimony is true, the theory is correct and granting the petition, with these conditions [3] annexed, amounted to an acceptance of the conditions. It is elementary that one party cannot accept an offer in different terms from those made and thereby complete a contract. The county either accepted plaintiff's offer or it did not, and its acts in opening the road over his land and fencing the right of way are very persuasive evidence of the correctness of plaintiff's position. If his testimony as to the terms and conditions upon which he granted the right of way is true, he is entitled to prevail in this action. The cause should have been submitted to the jury for a determination of the merits.

The judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, did not hear the argument and takes no part in the foregoing decision.

Rehearing denied January 23, 1918.

J. I. CASE THRESHING MACHINE CO., RESPONDENT, v.
SIMPSON, APPELLANT.

(No. 3,844.)

(Submitted December 8, 1917. Decided January 4, 1918.)

[170 Pac. 12.]

Negotiable Instruments — Complaint — Insufficiency — Default Judgment—Setting Aside—Improper Denial.

Default Judgment—Refusal to Set Aside—Imposition of Terms—When Improper.

1. Where defendant on the day after rendition of judgment against him by default had asked that the judgment be set aside and the cause tried on its merits, but had not applied for a continuance or leave to file an amended answer, an order imposing terms affecting these subjects as a condition precedent to the granting of the motion was unauthorized, and the defendant was at liberty to treat it as in effect denying the motion.

Same—Negotiable Instruments—Complaint—Insufficiency.

2. The complaint in an action by the payee against the maker of a promissory note, which was also drawn to bearer, being fatally defective for failure to allege that the note was made, executed or delivered to plaintiff, that plaintiff was the owner or holder thereof, or that the amount due upon the indebtedness was due to plaintiff in that it could not be gathered from its recitals that the action was being prosecuted in the name of the real party in interest, refusal to set aside a judgment by default was error.

Appeal from District Court, Valley County; F. N. Utter, Judge.

ACTION by the J. I. Case Threshing Machine Company against John H. Simpson. From a default judgment for plaintiff and an order denying his motion to vacate the same, defendant appeals. Reversed and remanded.

Mr. Thos. Dignan, Mr. C. D. Borton and Messrs. Nolan & Donovan, for Appellant, submitted a brief.

Mr. John Hurly and Mr. Clement A. Parker, for Respondent, submitted a brief; Messrs. Norris & Hurd, of Counsel; Mr. Geo. E. Hurd argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In January, 1915, the J. I. Case Threshing Machine Company, a corporation, commenced this action to enforce payment of three promissory notes. The defendant first interposed a general demurrer, which was overruled, and then answered. At the time the cause was set for trial, defendant and his counsel failed to appear, and judgment was rendered in favor of plaintiff for [1] the full amount claimed. On the day following, counsel for defendant made formal application to have the judgment set aside and the cause tried on its merits. The grounds of the motion were excusable neglect in failing to appear at the trial, and insufficiency of the complaint to state a cause of action. In disposing of the motion the court made the following order: "The court ordered that the judgment in the case be set aside and opened on the condition that the defendant within twenty days after this date pay the clerk of the court for the plaintiff the taxable costs of the plaintiff, and further that the defendant file his written consent that the case be tried on the issues as joined when the case was set for trial on January 26, 1916, and, further that defendant file his written consent within twenty days that the case be tried at the next ensuing term of court." Defendant treated the order as one denying his motion, and appealed from the judgment and from so much of the order as required him to consent to try the cause upon the issues already framed, and to agree that the cause should be tried at the next term of court.

The order indicates that the trial court considered defendant's showing sufficient, and no complaint is made that the court imposed costs. There was not before the court any application for a continuance or for leave to file an amended answer, and the imposition of terms affecting those subjects was clearly not authorized or justified. For this reason, defendant was at liberty to treat the order as, in effect, denying his motion.

The motion should have been granted, for the complaint does not state facts sufficient to constitute a cause of action in favor

of the plaintiff. The complaint alleges that on January 12, [2] 1911, the defendant made, executed and delivered his three promissory notes, a copy of each of which is set forth at length. It alleges that certain payments were made, and that the sum of \$2,108.80 and interest "still remains due, owing and payable upon said promissory notes, no part of which has been paid." Each of the notes is payable to "J. I. Case Threshing Machine Co. (incorporated) or bearer." Assuming that the payee and plaintiff are the identical corporation, the complaint still fails to disclose that this action is prosecuted in the name of the real party in interest, as required by section 6477, Revised Codes. The complaint does not allege that the notes were made, executed, or delivered to the plaintiff, or that plaintiff is the owner or holder thereof, or that the amount due upon the indebtedness is due to the plaintiff. (Sec. 6573, Rev. Codes.) Indeed, it would seem that the complaint was drawn adroitly to avoid any direct allegation that plaintiff has an interest in the notes sufficient to warrant it in maintaining the action.

It is true that the notes are payable to J. I. Case Threshing Machine Company (incorporated), but they are also drawn to *bearer*, and such notes pass from hand to hand by mere delivery. (Sec. 5878, Rev. Codes.) It was not absolutely necessary for plaintiff to allege that it was the owner of the notes at the time suit was commenced. A holder of a negotiable instrument may maintain an action for its collection (sec. 5899, Rev. Codes); but to state a cause of action in favor of plaintiff, it was necessary to disclose some right in it by virtue of which it maintains the action and upon the faith of which defendant, by paying the judgment, may be fully discharged of his obligation and relieved of the annoyance of further litigation at the hands of someone else who may hereafter appear in possession of the notes. The general rule is well stated in 8 Corpus Juris, 885, 886, as follows: "Plaintiff must show title to the bill or note in suit or privity between himself and defendant, or that as the holder thereof, he has the legal right to maintain the action and to recover thereon. * * * In an action by the payee against the

maker of the note it is sufficient to allege the execution and delivery of the note to *plaintiff*." Neither the answer of the defendant nor the judgment of the court aids the complaint in this instance.

Counsel for respondent are in error in assuming that this court decided in *Meadowcraft v. Walsh*, 15 Mont. 544, 39 Pac. 914, that an allegation of ownership of the note sued upon is surplusage. The question there determined was one of substantive law—not one of pleading. The complaint in that action alleged that each of the notes had been duly indorsed and delivered to plaintiff, and that plaintiff was then the owner and holder thereof.

The judgment and order are reversed and the cause is remanded for further proceedings.

Reversed and remanded.

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

**MCCARTHY, APPELLANT, v. STATE BANK OF TOWNSEND
ET AL., RESPONDENTS.**

(No. 3,841.)

**STATE BANK OF TOWNSEND, RESPONDENT, v. MCCARTHY,
APPELLANT.**

(No. 3,846.)

(Submitted December 7, 1917. Decided January 7, 1918.)

[170 Pac. 15.]

Real Property—Mortgages—Foreclosure Sale—Rights of Purchaser—Void Decree—Subrogation—Action for Reimbursement—Caveat Emptor—Laches—Mistake.

Foreclosure of Mortgage—Judicial Sale—Rights of Purchaser—Subrogation.

1. A purchaser at a judicial sale submits himself to the jurisdiction of the court and may, on proper occasion, be subrogated to

whatever rights and remedies exist in favor of the judgment creditor whose claim has been satisfied by the proceeds of the sale.

Same—Subrogation—When not Applicable.

2. Subrogation may be asserted or waived by the party entitled to its benefit, but is not intended to be applied in all cases, as where it would be of no advantage, where justice does not demand its application, where it would prejudice the rights of innocent parties, where its effect would be to compel the acceptance of a doubtful or inadequate remedy for one which would be more certain or adequate.

[As to the right of subrogation, see note in 99 Am. St. Rep. 474.]

Same—Subrogation—Rights of Subrogee.

3. A subrogee cannot, as such, acquire any other or greater rights than those possessed by the party whom he disposes.

Same—Void Decree—Rights of Purchaser—Action for Reimbursement.

4. A purchaser of lands at a foreclosure sale under a decree which, unknown to him but known to the judgment creditor, was void because of nonservice of summons on some of the defendants, may, under section 6844, Revised Codes, as well as in the absence of statute, by independent action recover reimbursement from the judgment creditor, subrogation not offering any remedy.

Same—*Caveat Emptor*—When Doctrine Inapplicable.

5. Where a purchaser at a foreclosure sale before bidding had consulted the decree and found a recital therein that summons had been duly served upon all defendants and in reliance thereon bought and paid for the property, he was not prevented by the doctrine of *caveat emptor* from seeking reimbursement from the judgment creditor when the decree was set aside as void for failure of service of summons upon all parties interested.

Same—Laches—Mistake of Law.

6. Failure to ascertain accurately from court records that a decree in a foreclosure suit was void because of insufficient service of summons, the decree itself reciting that summons had been properly served upon all parties defendant, held not to have been such culpable negligence as to bar the purchaser from relief upon the ground of mistake.

Appeal from District Court, Broadwater County; John A. Matthews, Judge.

ACTIONS by T. J. McCarthy against the State Bank of Townsend and others (No. 3,841), and by the State Bank of Townsend against Gavin W. Hamilton, T. J. McCarthy and others (No. 3,846). T. J. McCarthy appeals from the judgment in the first cause, and from an order of dismissal of a petition after demurrer sustained, made in the second. The appeals were consolidated. Judgment in cause No. 3,841 reversed, and order in No. 3,846 affirmed.

Messrs. Walsh, Nolan & Scallon, for Appellant, submitted a brief in behalf of Appellant, as well as one in reply to that of Respondents; *Mr. C. B. Nolan* argued the cause orally.

Under *Hamilton v. Hamilton*, 51 Mont. 509, 154 Pac. 717, we are entitled to recover our money from the bank, by virtue of section 6844, Revised Codes. However, independent of the statute, the right exists to recover the purchase money from the creditor. See *Henderson v. Overton*, 2 Yerg. (Tenn.) 394, 24 Am. Dec. 493, also, *Hoxter v. Poppleton*, 9 Or. 481, holding the purchaser entitled to recover the consideration where an execution was issued without judgment. (*Chapman v. City of Brooklyn*, 40 N. Y. 372; *Schwinger v. Hickok*, 53 N. Y. 280, 282.)

It is insisted, however, that the doctrine of *caveat emptor* applies to our prejudice. While the doctrine applies to judicial sales, it does not apply to the defects which in this case confront us. (Sec. 5117, Rev. Codes.) In every judicial sale there is an implied warranty that the proceedings have been so regularly conducted as to carry the title of the defendant's interest, and that the proper persons have been made parties, and unless this is fulfilled, the purchaser is under no obligation to fulfill his purchase. (Note, 26 Am. Rep. 39.) As where a judgment creditor is not made a party to a foreclosure (*Verdin v. Slocum*, 71 N. Y. 345); or summons has not been properly served. (*Smith v. Wells*, 69 N. Y. 600.)

The maxim of *caveat emptor* applies where there is a want of ownership in the property by the defendant, but it does not apply to the defects in the title of the purchaser occasioned by the failure of the sale to pass the title. (*Bond v. Montgomery*, 56 Ark. 563, 35 Am. St. Rep. 120, 20 S. W. 525; *Meher v. Cole*, 50 Ark. 361, 7 Am. St. Rep. 101, 7 S. W. 451; *Scott v. Dunn*, 21 N. C. 425, 30 Am. Dec. 174; *Valle's Heirs v. Fleming's Heirs*, 29 Mo. 152, 77 Am. Dec. 557; *Crippen v. Chappel*, 35 Kan. 495, 57 Am. Rep. 187; Freeman on Void Judicial Sales, secs. 51, 54.)

In *Forst v. Davis*, 101 Ky. 343, 41 S. W. 27, where a commissioner's deed was invalid, the purchaser was entitled to get his

money back. In *Hall v. Dineen*, 26 Ky. Law Rep. 1017, 83 S. W. 121, it was held that upon a rescission of the contract the parties should be placed in the positions in which they were before the sale. In *Succession of Dumestre*, 40 La. 571, 4 South. 328, money in the hands of a commissioner was ordered returned upon discovery of a defective title. In *Macmanus v. Orkney* (Tex. Civ.), 39 S. W. 614, an administrator's sale was void for uncertainty, and the purchaser, whose money canceled the indebtedness belonging to the estate, was adjudged entitled to a lien on all of the lands of the deceased for the return of the purchase price. In *Virginia-Carolina Chem. Co. v. McLucas*, 87 S. C. 350, 69 S. E. 670, it was held that the purchaser at a sale should not be compelled to comply with his bid when the title proved defective. (See, also, *Dresser v. Kromberg*, 108 Me. 423, Ann. Cas. 1913B, 542, 36 L. R. A. (n. s.) 1218, 81 Atl. 487; *Pease v. Bamford*, 96 Me. 23, 51 Atl. 234.)

Messrs. Purcell & Horsky, for Respondent Bank, submitted a brief; *Mr. Antone J. Horsky* argued the cause orally.

A purchaser at a foreclosure sale submits himself to the jurisdiction of the court in the foreclosure suit, becomes a party to it, and for any irregularity in that suit his remedy is by motion in such suit and not by independent action. (*Boggs v. Fowler*, 16 Cal. 560, 76 Am. Dec. 561.) A purchaser at a mortgage foreclosure sale steps into the shoes of the plaintiff in such action, is subrogated to his rights; in effect he becomes an assignee of the mortgage and notes, and subjects himself to the jurisdiction of the court in that action, and he has an ample, adequate and speedy remedy for all his legal rights in that action. This being so, whatever relief the purchaser at such sale is entitled to must be sought in that action; he cannot maintain an independent, equitable action, such as the instant one, for relief, nor is his remedy against the plaintiff in the foreclosure action, but against the mortgagors and the mortgaged property. (*Burton v. Lies*, 21 Cal. 87; *Johnson v. Robertson*, 34 Md. 165; *Cook v. Toumbs*, 36 Miss. 685; *Hudgin v. Hudgin's Exr.*, 6 Gratt. (Va.)

320, 52 Am. Dec. 124; *Robinson v. Ryan*, 25 N. Y. 320; *Grapengether v. Fejervary*, 9 Iowa, 162, 74 Am. Dec. 336; *Honaker v. Shough*, 55 Mo. 472; *Stoney v. Shultz*, 1 Hill Eq. (S. C.) 465, 27 Am. Dec. 429; *Tutwiler v. Atkins*, 106 Ala. 194, 17 South. 394; *Moore v. Cord*, 14 Wis. 213; *King v. Brown*, 80 Tex. 276, 16 S. W. 39; *Dutcher v. Hobby*, 86 Ga. 198, 22 Am. St. Rep. 444, 10 L. R. A. 473, 12 S. E. 356; 2 Jones on Mortgages, 6th ed., sec. 1678.)

Appellant is basing his supposed right of recovery upon Revised Codes, section 6844, which is section 708 of the California Code of Civil Procedure, but in this he is manifestly mistaken. The relief provided for by that section of the codes is, by its express terms, limited to sales had upon execution. But the sale attacked in the present case was one upon order of the court, in an equitable foreclosure suit, and the distinction between the two is self-evident. It is shown in *Thomas v. Thomas*, 44 Mont. 102, Ann. Cas. 1913B, 616, 119 Pac. 283. For further cases pointing out the distinction between sales had upon execution and judicial sales, see *Norton v. Reardon*, 67 Kan. 302, 100 Am. St. Rep. 459, 72 Pac. 861; *Southern California Lumber Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 28 Am. St. Rep. 115, 118, 29 Pac. 627; *Dawson v. Litsey*, 10 Bush (73 Ky.), 408; *Hershy v. Latham*, 42 Ark. 305; *Preston v. Breckinridge*, 86 Ky. 619, 6 S. W. 641.

How can the appellant claim that he did not know that the Hamiltons had not been served with process? An examination of the records would have disclosed this immediately. He did not make such examination, and is therefore guilty of negligence, and must suffer the consequences of his own act and inattention to his interests. (*Trapier v. Waldo*, 16 S. C. 276; *Boorum v. Tucker*, 51 N. J. Eq. 135, 26 Atl. 456; *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891, 38 L. R. A. 694, 27 S. E. 411.)

Mr. Frank A. Roberts, for Respondent Robert J. Gleason, submitted a brief.

MR. JUSTICE SANNER delivered the opinion of the court.

These appeals (consolidated Nos. 3,841 and 3,846) seek to present, upon the same facts but in different proceedings, the ultimate question what, if any, relief the appellant should have.

The postulated facts are: Gavin W. Hamilton, Mollie G. Hamilton and Robert J. Gleason were mortgagors to the State Bank of Townsend of certain real property in which Gleason owned an undivided one-half interest and the Hamiltons a like estate. On April 16, 1913, the obligations secured by the mortgages were past due, and the Townsend bank brought suit to foreclose, naming the Hamiltons, Gleason and the First National Bank of Missoula (the last upon allegations of adverse claim) as defendants. Summons was issued, and the return shows service upon the Missoula bank on April 22; that the other defendants could not be found, and that copies had been sent them by registered mail—registry return receipts from Tucker, Utah, being attached, each dated April 25, 1913, and signed by R. M. Hamilton as “addressee’s agent.” Thereafter the Townsend bank caused an *alias* summons to issue, the return whereof shows personal service upon Gleason on May 21. None of the defendants appeared, and on September 6, 1913, the default of all of them was entered and indorsed upon the complaint. Ten days later a judgment was entered decreeing the foreclosure of the mortgages, and directing the sale of the mortgaged property, which judgment contained the recital that it had been made to appear to the satisfaction of the court “that the summons in said action, together with a copy of the complaint therein, has been duly served upon said defendants and each of them, and that all of said defendants have been duly and regularly summoned to appear and answer.” Pursuant to such decree and an order of sale issued thereunder, the sheriff, after due notice, put up the property at public auction and sold it to T. J. McCarthy for \$13,475—a sum sufficient to meet the face of the judgment, with attorney’s fees, costs and accruing costs, and to leave a balance of \$9.45 in the hands of the sheriff—of all of which due return was made. A cer-

tificate of sale was issued to McCarthy, and a year later, no redemption having occurred, a deed was delivered to him. At all times during this period McCarthy was ignorant of any defect in the proceedings or of anything that would affect the validity of the judgment and sale; he believed that both were valid, and that by means of the sale he would acquire, and by the deed had acquired, all the right, title and interest of the Hamiltons as well as of Gleason in and to the property, otherwise he would not have bid for or purchased the same; and he was moved to such belief by the recitals of the judgment showing that the proceedings leading up to the same were regular and sufficient, which recitals had been inserted at the instance of the Townsend bank, with knowledge that the Hamiltons had not in fact been served with summons. Gleason's interest in the property was not worth more than one-half of what McCarthy had paid, and McCarthy has been unable to obtain possession, being forcibly prevented and evicted by Gavin W. Hamilton. Learning late in October, 1914, that the judgment and the sale thereunder were void as to the Hamiltons, McCarthy notified the Townsend bank of his rescission of the transaction, so far as rescission could be effected by him, offering to make any and all stipulations or instruments necessary to restore the parties to their *status quo ante*, which he still stands ready to do. On December 14, 1914, pursuant to a stipulation between the bank and the Hamiltons, an order of court was made and entered vacating said judgment as against the Hamiltons because the same is void.

These facts were set forth first in an amended complaint by McCarthy in an action against all the parties to the foreclosure, praying, among other things, that the judgment as against the Hamiltons and all the proceedings following the judgment in the foreclosure suit, including the sale, be annulled, that the Townsend bank repay to him the moneys paid by him for the property, together with interest and taxes, and that he have such other and further relief as may be just. The two banks and Gleason each filed a general demurrer, and these demurrers

were sustained. McCarthy declined to plead further and suffered judgment of dismissal. The appeal in No. 3,841 is from that judgment.

The other appeal—No. 3,846—is from an order, entered after demurrer sustained, dismissing a petition by McCarthy in the original foreclosure suit. This petition shows the same averments as the amended complaint in No. 3,841, and alleges as the reason for not making earlier application to the district court that McCarthy had been advised he could maintain an independent action, which he had endeavored to do. The demurrer to it was by the Townsend bank, and assigned among its grounds another action pending seeking the same relief.

The allegations, thus doubly made, clearly assert that, because of defects in the foreclosure suit, procured by the Townsend bank and unknown to him, the appellant McCarthy did not get what he had made his bid and paid his money for. He therefore should, upon the plainest principles of equity, be entitled to adequate relief somewhere, unless barred by his own fault or by some principle of law peculiar to this situation. But while this is so, it must also be obvious to any one that both of these appeals cannot be sustained; for if the appellant was privileged to proceed outside the original foreclosure suit, his action was pending when the petition in the foreclosure suit was filed. Some contention is made that the latter proceeding was not an action so as to warrant the ground of "another action pending," assigned in the demurrer to the petition. This, however, is a refinement which for present purposes may be regarded as negligible. The decisive question is whether the independent action was available; and this the Townsend bank denies upon the ground that McCarthy, as purchaser under the order of sale in the foreclosure suit, became subrogated to the rights of the bank, was thereby vested with an adequate remedy in that suit, and was obligated to pursue such remedy.

It undoubtedly is the rule that the purchaser at a judicial [1] sale submits himself *pro hac vice* to the jurisdiction of the court (*Boggs v. Fowler & Hargrave*, 16 Cal. 560, 76 Am. Dec.

561; *Andrews v. O'Mahoney*, 112 N. Y. 567, 20 N. E. 374), and may, on proper occasion, be subrogated to whatever rights and remedies exist in favor of the judgment creditor whose claim has been satisfied by the proceeds of the sale (Freeman on Void Judicial Sales, secs. 51 *et seq.*; note to *Cowper v. Weaver's Admr.*, 69 L. R. A. 33, 42). That the subrogation thus available, [2] however, cannot in all cases be imperative or exclusive is patent from the nature of the thing itself. Speaking generally, the doctrine is one of equity and benevolence; like contribution and other similar equitable remedies, it came from the civil law; its basis is the doing of justice, its object the prevention of injustice; it may be asserted or waived by the party entitled to its benefit, but is not intended to be applied in all cases without regard to circumstances, as where it would be of no advantage, where justice does not demand its application, where it would prejudice the rights of innocent parties, where its effect would be to compel the acceptance of a doubtful or inadequate remedy for one which might be more certain and adequate. (Sheldon on Subrogation, secs. 1, 4, 41; 37 Cyc. 363 *et seq.*)

The bearing of these general propositions will be plain enough [3] when it is recalled that a subrogee can never, as such, acquire any other or greater rights than those possessed by the party whom he displaces. Now, what are the rights of the Townsend bank to which the appellant, McCarthy, would thus succeed? They are, says the bank, "to perfect the proceedings in the foreclosure suit, and to foreclose all rights of the mortgagors therein in and to the mortgaged premises." But Gleason insists that this may not be done; that the judgment in the foreclosure suit being valid and final as to him, and all his interests in the property having been regularly sold to satisfy the same, the sale, so far at least, must stand; that, having paid his debt to the law, he is now an innocent party, and ought not to be harassed or endangered by further proceedings, begotten of circumstances for which he is no wise responsible—and this position seems to us impregnable. Yet, if it is, McCarthy's

right under subrogation would amount to nothing more than the privilege to proceed with the foreclosure as against the Hamiltons and to cause a public sale of their interest—winding up, not with what he had bought and paid for, to-wit, title to the whole of the premises, but more likely as cotenant with a stranger. Again, how is McCarthy to proceed “to foreclose all rights of the mortgagors in and to the mortgaged premises”? How is he to bring the Hamiltons, who have never been served with summons, into court? By *alias* summons? It is too late. (Rev. Codes, sec. 6516.) By special summons under Code sections 7129 *et seq*? This case cannot be brought within these provisions. By petition and notice under section 6844? So far as the Hamiltons are concerned, there is no judgment to revive. By such notice in the foreclosure suit as would be given a party thereto? Hamilton is not a party, and no statutory provisions exist by which he can be made a party in any such fashion. Indeed, the only way apparent to us by which jurisdiction of the Hamiltons’ interest can be obtained is through another suit to foreclose the mortgage as to it, supported by service—and, needless to say, this, besides presenting its own difficulties, is not to proceed in the original suit but by independent action. Clearly, then, subrogation does not offer to McCarthy any certain remedy, if any remedy at all in the original suit.

Moreover, the relief suggested as available through subrogation is altogether inadequate. No result short of enabling McCarthy to get what he paid for, or reimbursement, could meet for a moment the demands of equity. Under subrogation, reimbursement of course is out of the question; yet subrogation does not promise that McCarthy will be enabled to get what he paid for, and it cannot be applied so as to accomplish that result [4] without again involving Gleason. It follows, therefore, that if McCarthy is entitled to any adequate relief, it must be outside of subrogation and by independent action for reimbursement. That such an action does lie, without reference to statute, has been often decided (*Henderson v. Overton* 2 Yerg. (Tenn.) 394, 24 Am. Dec. 492; *Hoxter v. Poppleton*, 9 Or. 481; *Hall v.*

Dineen, 26 Ky. Law Rep. 1017, 83 S. W. 120; *Schwinger v. Hickok*, 53 N. Y. 282; 24 Cyc., par. B.; 17 Am. & Eng. Ency. of Law, 1024; note to *Cowper v. Weaver's Admr.*, 69 L. R. A. 56); when brought, it necessarily implies that subrogation has been waived, and it proceeds against the only party from whom reimbursement can come, viz., the judgment creditor who caused the sale and received the results thereof.

We by no means venture to assert that declarations may not be found the effect of which is to declare the compulsory and exclusive theory of subrogation in cases of this kind; but we deem it noticeable that many of the authorities cited to support that view contain a recognition to the contrary, express or implied. (See *Ketchum v. Crippen*, 37 Cal. 223; *Boggs v. Fowler & Hargrave*, *supra*; Freeman on Executions, sec. 352; Freeman on Void Judicial Sales, sec. 49; 3 Jones on Mortgages, secs. 1678-1681.) The matter has, however, been settled by the explicit provisions of our statute (Rev. Codes, sec. 6844). In terms this section is addressed to sales under execution, but the reasoning in *Hamilton v. Hamilton*, 51 Mont. 509, 154 Pac. 717, and other cases (*Harlan v. Smith*, 6 Cal. 173; *Stout v. Macy*, 22 Cal. 647) commands its application to sales under foreclosure. Here we have a sale void as to the Hamilton interest for want of valid authority—which presents a case of “irregularity in the proceedings concerning the sale,” so as to bring the statute to bear (*Elling v. Harrington*, 17 Mont. 322, 42 Pac. 851; *Merguire v. O'Donnell*, 139 Cal. 6, 96 Am. St. Rep. 91, 72 Pac. 337), while the constructive eviction necessary to authorize recourse against the judgment creditor is sufficiently alleged (*Elling v. Harrington*, *supra*).

The bank insists, however, that the maxim “*caveat emptor*” [5] prevents McCarthy from seeking reimbursement. This might be correct from the point of view of Gleason, who, as we have seen, must be regarded as out of the case, or of the Hamiltons, who were never in it. But, according to our Code (sec. 5117), there is an implied warranty that the seller does not know the sale will not pass good title to the property, and no

such warranty can coexist with *caveat emptor* as the respondents apply it. Nor has such application the support of general authority. If, at a judicial sale, which never in contemplation of law offers more than the judgment debtor's interest in the property sold, the purchaser gets all that was offered, though it be less than he supposed, *caveat emptor* prevents him making complaint of that; but it is not and should not be the rule that he cannot complain of the judgment creditor if, because of defects in the proceedings for which the latter is responsible, he did not get even what was offered. (*Henderson v. Overton, supra; Bond v. Montgomery*, 56 Ark. 563, 35 Am. St. Rep. 120, 20 S. W. 525.) Particularly is this true in cases where the purchaser has referred to and relied on the solemn assurances of the judgment that everything was as it should be—unless the law, instead of furthering its declared policy to encourage bidding, would bait a trap with exactions beyond the power of the average laymen to meet. The Supreme Court of New York has well said—and the declaration has had the approval of this court (*Elling v. Harrington, supra*): “It is doubtless true that a person claiming a right or title under a conveyance or an instrument, in execution of a power, is in general chargeable with notice of any infirmity in his title disclosed by the instrument under which he claims, or of which, by reasonable diligence, he would have become acquainted. * * * The rule is adopted to determine the question of superior equities, and to protect innocent persons from being defrauded. * * * This principle is invoked in this case to debar a plaintiff who has paid his money in good faith, without actual knowledge, on a purchase under a void execution, from recovering it back of the persons to whom it was paid, and who were the plaintiffs in and procured the sale under the execution, and who, at the time of the sale, knew that the purchaser would acquire no title to the property. The principle referred to has no proper application to this case. To make out a voluntary payment, knowledge that the execution was void is imputed to the purchaser, although there was none in fact, and this for the benefit of persons having

actual knowledge, and who took the plaintiff's money. The language of Lord Mansfield in *Moses v. Macfarlane* (2 Burr. 1009) is applicable. In speaking of the equitable action for money had and received, he says: 'It lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition, or extortion, or oppression, or an undue advantage taken of a party's situation contrary to laws made for the protection of persons under these circumstances.' '' (*Schwinger v. Hickok, supra.*)

Neither can it be conceded that failure to ascertain the true state of the record in the foreclosure proceedings was necessarily [6] such culpable negligence as to bar McCarthy from relief upon the ground of mistake. The argument is that the means of knowledge were at his command; all he had to do was to go behind the judgment, consult the judgment-roll, and accurately determine therefrom whether the judgment as to the Hamiltons was valid or void; and the underlying theory is that the mistake is one of law, from which relief cannot be had, because every one is presumed to know the law. That such is not the rule in this state has been declared in several decisions, among them *Brundy v. Canby*, 50 Mont. 454, 148 Pac. 315, wherein certain remarks, quite pertinent here but too extended for quotation, will be found (50 Mont.) at pages 471-473.

Our conclusion, then, is that McCarthy was entitled to subrogation if he wanted it; but he could waive it, and proceed by independent action to secure reimbursement of the bank. In other words, he had an election of remedies, and he exercised that election—wisely, we think—when he filed his complaint in No. 3,841. Having chosen, he could not thereafter proceed nor contemporaneously maintain his petition in the foreclosure suit; hence the demurrer to that petition was properly sustained. His complaint in the independent action, however, was sufficient to authorize recovery from the Townsend bank, although no cause of action was or could be stated as to Gleason or the Missoula bank.

The order appealed from in No. 3,846 is therefore affirmed; but the judgment in No. 3,841 is reversed so far as the Townsend bank is concerned, and the cause is remanded, with directions to overrule the demurrer of the Townsend bank. The costs of these appeals will be divided equally between that respondent and the appellant, McCarthy.

MR. JUSTICE HOLLOWAY concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

STATE EX REL. PAIGE, RELATOR, v. DISTRICT COURT
ET AL., RESPONDENTS.

(No. 4,131.)

(Submitted November 23, 1917. Decided January 7, 1918.)

[169 Pac. 1180.]

Officers — Removal—Illegal Fees—Statutes—Amendment—Effect on Jurisdiction.

County Commissioners—Removal—Statutes—Amendment—Jurisdiction.

1. After an accusation for collecting illegal fees had been brought against a county commissioner under section 9006, Revised Codes, but before the defendant was brought to trial, the section was amended so as to change not only the procedure but the very basis of the right. Neither Constitution nor statute provides for a general saving clause. *Held*, that in the absence of such clause or a special provision in the amendatory Act saving all proceedings pending under section 9006, the court was without jurisdiction of the subject matter of the accusation either under the old or the new Act.

Statutes—Amendment—Effect.

2. Where the legislature declares that an existing statute is amended "to read as follows," the new Act takes the place of the old one exclusively, all portions of the original statute omitted from the amended one being repealed.

[As to when change in statute is to be regarded as creating new statute instead of being a mere amendment, see note in *Ann. Cas.* 1914, 1171.]

Original application by the State, on relation of Bert G. Paige, for writ of prohibition to the District Court of the Fifth Judicial District in and for the County of Madison and William A. Clark, a Judge thereof. Writ issued.

Mr. M. M. Duncan and *Mr. J. R. Jones*, for Relator, submitted a brief; *Mr. Duncan* argued the cause orally.

Mr. James T. Shea, for Respondents, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This proceeding presents the inquiry: May a county commissioner be tried now upon an accusation presented against him pursuant to section 9006, Revised Codes, for collecting illegal fees—the statute having been changed after the accusation was filed, but before the accused was brought to trial? The circumstances out of which this proceeding arises are set forth fully in *State ex rel. Payne v. District Court*, 53 Mont. 350, 165 Pac. 294.

Under section 9006 a county commissioner was liable to removal from office for collecting illegal fees. If the bare fact appeared that, acting by virtue of his office, the commissioner had collected fees not authorized by law, but one result could follow, namely, his removal from office. He could offer no excuse. His ignorance of the law, his good faith, or his honest belief that he was entitled to the fees availed him nothing; neither could he be heard to say that the county had received full value in the services for which the fees were charged. A criminal intent or sinister purpose was not an ingredient of the offense defined, and it was therefore only necessary to allege the official capacity of the accused and that, acting by virtue of his office, he collected certain fees which the law did not authorize. (*Leggatt v. Prideaux*, 16 Mont. 205, 50 Am. St. Rep.

498, 40 Pac. 377; *State ex rel. Rowe v. District Court*, 44 Mont. 318, Ann. Cas. 1913B, 396, 119 Pac. 1103.)

By an Act approved February 14, 1917 (Laws 1917, Chap. 25), it is declared that section 9006 is amended "to read as follows." Then follows the new enactment. Not only are the two statutes radically different in matters of procedure, but the very basis of the right is changed altogether. The gist of the offense defined by section 9006 was taking illegal fees, whether done ignorantly, in good faith, or with a dishonest purpose. The gist of the offense defined by the amended statute is the criminal intent. Unless the accused collects the illegal fees knowingly, willfully and corruptly, he commits no offense under the new Act. Under the original statute the accused was not entitled to a jury trial, but he is under the new Act. Under this new provision he may offer evidence of good faith, honest mistake or value received by the county, whereas under section 9006 none of these matters was relevant.

When the legislature declares that an existing statute is to be [2] amended "to read as follows," etc., it thereby evinces an intention to make the new Act a substitute for the old one, and to make it take the place of the amended Act exclusively. (*City of Helena v. Rogan*, 27 Mont. 135, 69 Pac. 709.) In other words, so much only of the original Act as is repeated in the new statute is continued in force (section 119, Rev. Codes), and all portions omitted from the new Act are repealed. This is a general rule of construction (36 Cyc. 1083), and added emphasis is given to it in this instance by section 2 of the new Act, which repeals all Acts or parts of Acts inconsistent with it.

In this state we have no general saving clause provided by Constitution or statute for offenses other than those prosecuted by indictment or information, and the failure of the legislature, in enacting Chapter 25 above, to incorporate a clause saving all proceedings then pending under section 9006, deprived the district court of jurisdiction of the subject matter of the accusation. This is likewise a general rule, particularly applicable to the repeal of a statute which created a cause of action and conferred

jurisdiction over the same as did section 9006. (36 Cyc. 1228; *Pullen v. City of Eugene*, 77 Or. 320, Ann. Cas. 1917D, 933, 939, 146 Pac. 822, 147 Pac. 768, 1191, 151 Pac. 474.)

The accused cannot be tried for the offense defined by section 9006, for there is not now any such offense known to the law. He cannot be tried under the new statute, for at the time he committed the acts complained of there was not any such offense as is defined by Chapter 25 above.

The peremptory writ of prohibition will issue.

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

WIGGINS, RESPONDENT, v. INDUSTRIAL ACCIDENT BOARD, APPELLANT.

(No. 4,081.)

(Submitted November 10, 1917. Decided January 11, 1918.)

[170 Pac. 9.]

Workmen's Compensation—County Employees—Act of God—Death by Lightning—Judicial Notice.

Workmen's Compensation—Burden of Proof.

1. He who claims compensation under the Workmen's Compensation Act (Laws 1915, Chap. 96) has the burden of establishing, by a preponderance of the evidence, that the injury or death resulted from (1) an industrial accident (2) arising out of and (3) in the course of the employment.

Same—Death by Lightning—Act of God.

2. The Workmen's Compensation Act (Laws 1915, Chap. 96), is sufficiently comprehensive to include death due to a stroke of lightning while deceased was doing county road work with a grader made of steel and iron.

Same—Accident "Arising Out of Employment"—Definition.

3. An injury to a workman arises "out of" his employment, within the meaning of the Compensation Act above, if it is the result of exposure to a hazard peculiar to the employment, or of exposure to

more than the normal risk to which the people of the community generally are subject.

[As to what is accident arising out of and in course of employment within the meaning of the Workmen's Compensation Act, see notes in Ann. Cas. 1913C, 4; Ann. Cas. 1916B, 1293.]

Same—Attractiveness of Metals for Lightning—Judicial Notice.

4. The natural attractiveness of metals for lightning is not one of the law of nature of which courts may take judicial notice under section 7888, Revised Codes.

Same—Death by Lightning—Not Industrial Accident.

5. *Held*, that the death of a county employee who, while working on a road grader made of steel, was killed by lightning, did not result from an accident arising "out of" his employment, within the meaning of the Workmen's Compensation Act, since the hazard of being struck cannot be said to have been increased by the presence of the grader.

Appeal from District Court, Big Horn County; Chas. A. Taylor, Judge.

PROCEEDING under the Workmen's Compensation Act by Kate L. Wiggins for compensation for the death of Herbert L. Wiggins, deceased. From a judgment in favor of the claimant after rejection of the claim, the board appeals. Reversed and remanded.

Mr. S. C. Ford, Attorney General, and *Mr. R. L. Mitchell*, Assistant Attorney General, for Appellant, submitted a brief; *Mr. Mitchell* argued the cause orally.

"Even though there be an accident which occurred 'in the course of' the employment, if it did not arise 'out of the employment,' there can be no recovery; and even though there be an accident which arose 'out of the employment,' if it did not arise 'in the course of the employment,' there can be no recovery. (*Fitzgerald v. Clarke & Son*, [1908] 2 K. B. 796; *Craske v. Wigan*, [1909] 2 K. B. 635.)"

"The question whether or not an injury is an 'accident' within the purview of the Act is a mixed one of law and fact. (*Roper v. Greenwood*, [1900] 83 L. T. 471. When applied to ascertained facts, it is a question of law. (*Fenton v. Thornley & Co.*, [1903] App. Cas. 443, 19 T. L. R. 684.)" (*Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 459, 3 N. C. C. A. 585.) There is no question but that the injury in this case happened in the course

of the employment. But the contention of the appellant is that it is not an injury "arising out of the employment." (*Bryant v. Fissell, supra.*) The only cases in this country which have passed upon the question of compensation for injury by lightning are the following: *Hoenig v. Industrial Commission*, 159 Wis. 646, L. R. A. 1916A, 339, 150 N. W. 996, 8 N. C. C. A. 192; *Klawinski v. Lake Shore & M. S. R. Co.*, 185 Mich. 643, L. R. A. 1916A, 342, 152 N. W. 213, and *State ex rel. People's Coal & I. Co. v. District Court*, 129 Minn. 502, L. R. A. 1916A, 344, 153 N. W. 119, 9 N. C. C. A. 129.

In the Wisconsin case the deceased was struck by lightning while at work on a dam and while performing services growing out of and incidental to his employment. It had been raining and the rain was accompanied with thunder and lightning. In this case the judgment of the court below denying compensation was affirmed.

In the Michigan case a section-hand on the railroad was struck by lightning while in a barn to which he had resorted while in the ordinary performance of his duty, by direction of his foreman, for refuge from a storm. The supreme court held that "claimant's husband did not come to his death as the result of 'a personal injury arising out of and in the course of his employment,' within the meaning of the workmen's compensation law."

In the Minnesota case the deceased was employed as a driver on an ice route. He drove an open wagon and his duties required him to work in all kinds of weather. While on his usual route one morning, during a severe rainstorm accompanied by lightning, he left his team in the street and went toward a large elm tree standing just within the lot line, either for protection from the storm or on his way to solicit orders. Just as he reached an iron fence along the lot lightning struck the tree and struck him. The court held that the evidence was sufficient to sustain a finding that the accident was one "arising out of" his employment.

From a Washington case, that of *Stertz v. Industrial Ins. Commission*, 91 Wash. 588, 158 Pac. 256, it can be seen that the

supreme court of that state would allow compensation in a case like the present. But the Washington Act is very much different from our own.

Outside of this country there have been two cases before the courts of last resort involving the right to compensation for injury by lightning. In *Andrew v. Failsworth Industrial Society*, [1904] 2 K. B. 32, 90 L. T. (n. s.) 611, a bricklayer employed upon the construction of a building exceeding thirty feet in height was killed by lightning when working upon a scaffolding at a height of twenty-three feet from the ground. Evidence was given that a man working in that position incurred a risk substantially greater than the normal risk of being struck by lightning, and the county court judge found that the accident arose "out of" the employment. The appeal from the decision of the county court judge was dismissed, Lord Collins basing the decision of the court upon the finding of facts to the effect that the deceased employee incurred a peculiar risk greater than that which ordinary people run.

The second case, that of *Kelly v. Kerry County Council*, 42 Ir. L. T. 23, 1 B. W. C. C. 194, court of appeals, Ireland, decided in 1908, is directly in point with the case at bar. In this case a workman engaged on the road during a storm, whose duty was to clean out the gutters to prevent the water flooding the road, was struck dead by lightning. In a claim brought under the Act of 1906 by the widow it was held, supporting the decision of the county court judge of Kerry, that the death was not occasioned by accident arising out of the employment. (See, also, *Warner v. Couchman*, [1911] 1 K. B. 351, 4 B. W. C. C. 32; *Newman v. Newman*, 169 App. Div. 745, 155 N. Y. Supp. 665; s. c., 218 N. Y. 325, 113 N. E. 332.)

Lightning has always been considered as an act of God. (1 Corpus Juris, 1176.) It cannot possibly be said that lightning is a hazard inherent to the employment in which the deceased was engaged at the time of his death, and it would have been a physical impossibility for the employer in this case to provide for the protection and safety of his workmen against the hazard

of lightning. To come within the purview of the Act, the risk must be one peculiarly incident to the employment, and not a risk incurred by everyone whether in the employment or not. It is beyond dispute that lightning is a risk to which we are all subject, and it is not a risk inherent to this employment or peculiarly incident to the employment. (*Craska v. Wigon*, [1909] 2 K. B. 635; *In re McNicol*, 215 Mass. 497, L. R. A. 1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522; *Milliken v. Travellers' Ins. Co.*, 216 Mass. 293, L. R. A. 1916A, 337, 103 N. E. 898, 4 N. C. C. A. 512; *Federal Rubber Mfg. Co. v. Havolic*, 162 Wis. 341, 343, 156 N. W. 143; *Hopkins v. Michigan Sugar Co.*, 184 Mich. 87, L. R. A. 1916A, 310, 150 N. W. 325.)

Mr. C. C. Quinn, for Respondent, submitted a brief and argued the cause orally.

“Compensation Acts are based on a new theory of compensation distinct from the existing theory of damages” (*In re Kenney*, 222 Mass. 401, 111 N. E. 47; *In re Cripp*, 216 Mass. 586, Ann. Cas. 1915B, 828, 104 N. E. 565; *Andrejowski v. Wolverine Coal Co.*, 182 Mich. 298, Ann. Cas. 1916D, 724, 148 N. W. 684); “the underlying conception being one of insurance.” (*Trim Joint District School v. Kelly*, [1914] App. Cas. 667, Ann. Cas. 1915A, 104, 7 B. W. C. C. 247.)

An injury arises out of the employment when there is apparent to the rational mind, upon a consideration of all the facts, a causal connection between the conditions in which the work is required to be performed and the resulting injury, if the injury can be seen to have been a natural incident of the work. (*In re McNicol*, 215 Mass. 497, L. R. A. 1916A, 307, 4 N. C. C. A. 522.) “‘To arise out of the employment’ the accident must result from a risk reasonably incident to the employment.” (*State v. District Court*, 129 Minn. 502, L. R. A. 1916A, 344, 153 N. W. 119; *Parker v. Ship Black Rock*, [1915] App. Cas. 725, Ann. Cas. 1916B, 1300; *Melcher v. Freehold Investigation Co.*, 189 Mo. App. 170, 174 S. W. 455, 9 N. C. C. A. 65.) “It has been said that an injury which occurs while an employee is

doing what he might reasonably do at the time and place is one which 'arises out of and in the course of his employment.' '' (*Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 459, 3 N. C. C. A. 596; *Scott v. Payne Bros.*, 85 N. J. L. 446, 89 Atl. 927, 4 N. C. C. A. 682.) "An accident 'arises' out of the employment' when it is some thing the risk of which might have been contemplated by a reasonable person when entering the employment incidental to it." (*Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 459, 3 N. C. C. A. 596.) "A risk is incidental to the employment when it is either an ordinary risk directly connected with the employment, or an extraordinary risk which is only indirectly connected with it, owing to the special nature of the employment." (*Bryant v. Fissell*, *supra*; Elliott on Workmen's Compensation, 6th ed., p. 71.) "An injury, if it is a natural and necessary incident, or a consequence of the employment, although not foreseen or expected, arises out of it." (*Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, 158 Pac. 212; *State v. Ramsey County District Court*, 129 Minn. 502, L. R. A. 1916A, 344, 153 N. W. 119, 9 N. C. C. A. 129.) "If the nature of the employment or the conditions under which it was pursued or the exposure to injury it entails, or the doing of something incidental to the employment was the proximate cause of the injury, it arises out of the employment. The proximate cause of the injury is not necessarily that which immediately arises out of the employment, but it may be that which is reasonably incident to it." (*Larke v. John Hancock Mut. L. Ins. Co.*, 90 Conn. 303, 97 Atl. 320, 12 N. C. C. A. 308.) "The expressions 'arising out of' and 'in the course of' the employment are not synonymous, but the words 'arising out of' are construed to refer to the origin or cause of the injury, and the words 'in the course of' refer to the time, place and circumstances under which it occurred.' '' (*Hopkins v. Michigan Sugar Co.*, 184 Mich. 87, L. R. A. 1916A, 310, 150 N. W. 325.) "And the words are used conjunctively and not disjunctively. The former words must mean something different from the latter words. The workman must satisfy both the one and the other. The words 'out of' point to the origin or

cause of the accident, and the words 'in the course of' to the time, place and circumstances under which the accident takes place. The former words are descriptive of the connection or quality of the accident, the latter relate to the circumstances under which an accident of that character or quality takes place." (*Rayner v. Sligh Furniture Co.*, 180 Mich. 168, Ann. Cas. 1916A, 386, L. R. A. 1916A, 22, and note, 146 N. W. 665.)

"When a workman in the reasonable performance of his task sustains a physical injury as a result of the work he is engaged in, this is an accidental injury in the sense of the statute. If such an occurrence as this cannot be described in ordinary language as an accident, I do not know how otherwise to describe it." (*Zappala v. Industrial Ins. Commission*, 82 Wash. 314, L. R. A. 1916A, 298, 144 Pac. 54.) "An accident is an unlooked for or untoward event which is not expected or designed." (*Bryant v. Fissell*, *supra*.)

"The American cases arising out of acts of this character sustain our conclusions that there is no distinction between an accident and a fortuitous event." (*Zappala v. Industrial Ins. Commission*, *supra*.) "It need not have been foreseen or expected, but after the event it must appear to have flowed from that source as a rational consequence." (*In re McNicol*, 215 Mass. 497, L. R. A. 1916A, 307, 102 N. E. 697, 4 N. C. C. A. 522.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On June 28, 1916, Herbert L. Wiggins, in the employ of Big Horn county, engaged in work upon the public roads, was killed by lightning. His dependent mother presented to the Industrial Accident Board a claim for compensation, but the claim was rejected, and this action resulted. The trial court rendered and entered judgment in favor of the claimant, and the board appealed.

Section 16 of the Workmen's Compensation Act (Laws 1915, Chap. 96), provides that the industrial accident fund is liable for the payment of compensation to an employee, or in case of his

death to his dependents, for "injury arising out of and in the course of his employment." The phrase quoted was incorporated in the English Compensation Act of an early date, and has been copied into the Act adopted by practically every one of the states of the Union which has a statute dealing with the subject. It has been construed frequently by the British and American courts, and the authorities agree that, to warrant payment of compensation, the facts must disclose that the injury or death, as the case may be, resulted from (a) an industrial accident, (b) arising out of and (c) in the course of the employment. In other words, it is held that these terms are employed conjunctively, and not disjunctively, and that the burden of [1] proof is upon the claimant to establish, by a preponderance of the evidence, that the three of these conditions are met. The authorities are too numerous to be cited. They will be found collected and reviewed in Ann. Cas. 1913C, p. 1, Ann. Cas. 1914B, p. 498, Ann. Cas. 1916B, p. 1293, and Ann. Cas. 1917C, p. 760.

It is conceded by the appellant board that the death of Wiggins resulted from injury received by him while in the due course of his employment. Our inquiry is thus limited to the principal question and to questions subsidiary to one of them:

1. Can it be said that the death of Wiggins resulted from an [2] industrial accident? We have heretofore indicated that the terms of our Act are sufficiently comprehensive to include injury resulting from an act of God, and we adhere to that doctrine and answer the first inquiry in the affirmative. (*Lewis and Clark County v. Industrial Accident Board*, 52 Mont. 6, L. R. A. 1916D, 628, 155 Pac. 268.)

2. Did the death of Wiggins result from injury arising "out [3] of" his employment? The words "out of" point to the origin or cause of the accident and are descriptive of the relation which the injury bears to the employment. Without attempting to formulate a rule which will include every injury within the meaning of this phrase, it is sufficient for the purposes of this appeal to say that if, by reason of the nature of the employment

itself or the particular conditions under which the employment is pursued, the workman is exposed to a hazard peculiar to the employment under the circumstances, and injury results by reason of such exposure, then it may be said fairly that the injury arises out of the employment, or, stated in different terms, the workman must have been exposed by his employment to more than the normal risk to which the people of the community generally are subject, in order that his injury can be said to arise out of his employment. (Workmen's Compensation Acts; A Corpus Juris Treatise, p. 77.)

It is not contended that there was anything in the nature of the particular work upon which Wiggins was engaged that exposed him to extrahazard, but it is insisted that the conditions under which he was required to do his work at the time of the accident exposed him to more than the natural risk of being struck by lightning. He was required to work with a metal road grader at a time a thunderstorm was threatening. These facts appeared from an agreed statement. The trial court reached the conclusion that the deceased had been exposed to an abnormal risk, by a process indicated in an opinion expressed at the time judgment was rendered, as follows: "In this case we are of the opinion that we are justified in taking judicial notice of the principle of the lightning-rod, the natural attractiveness of metal, and especially of steel, for lightning, and we hold that under the facts in this case the deceased was exposed by reason of his employment about an iron and steel road grader to unusual hazard from lightning; that such employment increased the natural hazard from lightning to which all living creatures are exposed."

Assuming, without deciding, that in disposing of a case submitted upon an agreed statement of facts the court may supplement the record by matters of which it may properly take judicial notice, the question resolves itself into this: Was the court justified in taking judicial notice of the natural [4] attractiveness of metals for lightning? Section 7888, Revised Codes, enumerates the matters and things of which the

courts of this state may take judicial notice. The only provision of the statute which could possibly be invoked here is: "Courts take judicial notice of * * * the laws of nature."

In 15 R. C. L. 1127, it is said: "Judicial notice will be taken of scientific facts which are universally known, and which may be found in encyclopedias, dictionaries, or other publications, as well as of scientific methods and instruments, but they must be of such universal notoriety and so generally understood that they may be regarded as forming part of the common knowledge of every person. Here, as elsewhere, a judge may refresh his memory, if it is at fault, by resorting to any means for that purpose which he deems safe and proper. Examples of scientific matters of judicial cognizance are the laws of gravitation, the revolution of the earth, the change of the seasons, and the expansion of metals when heated and their contraction when cooled. The general nature and qualities of electricity and its manifold uses, the telephone, its nature, operation, and use, are likewise entitled to recognition under the same theory. * * *

However, cognizance may not be taken of scientific matters of uncertainty or dispute, or of insufficient notoriety, even though learnedly discussed in scientific publications."

Is it a known law of nature that metals, such as iron or steel, [5] possess properties which perceptibly attract lightning and enhance the danger from lightning within the sphere of their influence, and, if so, to what source of information may one resort to refresh his recollection and confirm him in his knowledge of the existence of the law? The trial court apparently treated the attractiveness of metals for lightning as the principle which underlies the use of the lightning-rod, or, stated differently, upon the assumption that the lightning-rod attracts the lightning, the iron and steel composing the road grader possessed the same property, and because of their attractiveness for the lightning, their enforced use by the deceased increased his risk beyond the normal limit.

As a result of scientific research covering a period of 150 years or more, certain fairly well-defined theories concerning the

action of lightning have been evolved. The discussion of them by scientists is elaborate and necessarily of a technical character. It would be impossible for us to reduce them to form available for presentation here, but an excellent summary of them is to be found in a brochure by H. H. Cochrane, a leading electrical engineer of this country, from which we quote the following:

“I may say that such laws [the laws governing the action of lightning] as exist are the same as those applying to other electric currents or discharges. Such laws, however, are exceedingly difficult to apply in the case of lightning, on account of the great number of unknown and unknowable variables which exist in any particular case. Certain atmospheric conditions cause the mist of vapor which forms clouds, to become charged with electricity. The potential of this charge tends to increase as the particles of moisture increase in size and decrease in number. When the potential becomes sufficiently high, the charged cloud will relieve itself by discharging either to another cloud of lower potential, or to the earth. It is the latter kind of lightning only in which we are interested.

“The character of such a discharge to earth depends upon the size of the cloud, its distance from the earth, the potential to which it is charged, the quantity of the charge, and the character of the path through the atmosphere in which the discharge takes place. The discharge may be oscillatory, with a frequency varying from a few thousand cycles per second up to several million cycles per second, or it may be a single direct stroke, with a current flowing in one direction only. In the latter case the impulse or wave of current will ordinarily have such a steep wave front that its characteristics will largely resemble those of the high frequency oscillatory discharge.

“When the atmosphere in the path of the discharge is variable in its characteristics, in other words, if the stroke passes successively through atmospheric strata of high and low temperature, and of varying degrees of moisture, the potential gradient will be correspondingly variable, so that the breakdown of the atmosphere will occur by a step by step process. The potential

gradient in the atmosphere in close proximity to the cloud may be sufficiently high to cause this part of the atmosphere to break down as a preliminary step. The potential of the cloud, having now advanced to a new point, will stress the atmosphere adjacent to the new point sufficient to cause another advance in the breakdown, and so the stroke will progress from point to point, until it finally reaches the earth, the action being similar to that of a quantity of water released on the top of a hill, which starts a small stream downward in the most available path, which stream turns from side to side in its course down the hill, always taking the easiest path, until it reaches the bottom.

“This, I believe, is the most usual form of lightning stroke. A rarer form occurs when the atmosphere is practically uniform in character between a broad, flat cloud and the earth. In this case the potential gradient between the cloud and the earth will be more nearly uniform, and no discharge will occur until the atmosphere throughout the entire course of the stroke is stressed to the breakdown point. The voltage required for this kind of a stroke is very much higher than that required for the class of stroke first described, and the severity of the stroke is correspondingly greater.

“If the earth were perfectly flat and uniform, the points at which lightning would strike would be determined entirely by the location of the charged clouds and the characteristics of the atmosphere intervening between the clouds and the earth. In general, the lightning would start from the lowest point on the charged cloud, and would follow the path of least resistance through the atmosphere to the earth. Where the earth is not uniform, due to either variable contour, or the existence of buildings, trees, poles, or other projections from the surface, or due to regions of good conductivity, caused by moisture, as compared with regions of poor conductivity, caused by dry sand or rock, the course of the lightning to the earth will be somewhat modified by these irregularities. This follows from the fact that the lightning always tends to take the path of least resistance.

“In all ordinary cases, however, the location and configuration of the storm clouds, and the more or less variable conductivity of the atmosphere, are by all means the predominating factors in determining where the lightning will strike, and all ordinary, natural, or artificial projections from the earth’s surface are of comparatively small importance.”

We may assume for present purposes that a lightning-rod properly adjusted to a building furnishes some protection against damage from lightning; but, so far as our research has gone, there appears to be no difference of opinion among the authorities that the lightning-rod is not employed because it attracts the lightning. From the articles in the standard encyclopedias and from the work of Sir Oliver Lodge, entitled “Lightning Conductors and Lightning Guards,” we deduce the following: The lightning-rod projecting above the building which it is intended to protect may be the object upon which the atmospheric breakdown occurs, and, being a good conductor of electricity, it will ordinarily conduct the discharge safely into the ground and relieve the building itself from danger. When electricity passes through a poor conductor, it generates intense heat. If there is no lightning-rod attached to a building, and the breakdown occurs at some projecting portion of the building, the heat generated by the passage of electricity through the building—a poor conductor—may, and usually does, cause damage. The atmospheric breakdown occurs at the weakest point—the place of maximum tension. If there are numerous projecting objects, such as lightning-rods, trees, *etc.*, the brushes and glows become so numerous that the tension may be relieved and the entire discharge dissipated without violence or damage, and primarily this is the purpose which the lightning-rod is to subserve. But if the charged cloud descends too quickly or has too great a store of energy, the crash occurs notwithstanding the projecting points, and the service of the lightning-rod is then employed to conduct the discharge into the ground. Because projecting objects may occasion the atmospheric breakdown, trees, tall buildings and other projecting objects are more likely

to be struck by lightning than other less prominent objects, and it is upon this theory, we think, that compensation for injury from lightning was allowed in *State v. Ramsey County Dist. Court*, 129 Minn. 502, L. R. A. 1916A, 344, 9 C. C. A. 129, 153 N. W. 119, and in *Andrew v. Fallsworth Industrial Soc.*, [1904] 2 K. B. 32, and denied in *Klawinski v. Lake Shore etc. R. Co.*, 185 Mich. 643, L. R. A. 1916A, 342, 152 N. W. 213, in *Hoenig v. Industrial Com.*, 159 Wis. 646, L. R. A. 1916A, 339, 150 N. W. 996, and in *Kelly v. Kerry County Council*, 42 Ir. L. T. 23, 1 B. W. C. C. 194. The decisions are harmonious. The difference in the facts alone accounts for the contrary results.

The most diligent research on our part has failed to disclose any authority which supports the theory upon which this cause was decided by the court below; on the contrary, so far as they point to any conclusion respecting the subject, the authorities indicate quite clearly that the presence of the metal road grader could not have had any perceptible influence upon the lightning, and did not tend to increase the natural hazard of the deceased's employment. For this reason it cannot be said from this record that his death resulted from an accident arising out of his employment, as the term is used in our Workmen's Compensation Act.

The judgment is reversed and the cause is remanded to the district court, with directions to enter judgment for the defendant board.

Reversed and remanded.

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

Rehearing denied February 11, 1918.

STATE EX REL. WIECK, RELATOR, v. DISTRICT COURT,
RESPONDENT.

(No. 4,117.)

(Submitted January 10, 1918. Decided January 14, 1918.)

[169 Pac. 1181.]

*Certiorari—Setting Aside Default—Attorneys—Stipulations—
Effect.*

1. Where an order setting aside a default was made in open court by stipulation of opposing counsel, the writ of *certiorari* will not issue to annul it.

[As to questions reviewable upon writ of *certiorari*, see note in 40 Am. St. Rep. 29.]

Original application, on the relation of Anthony Wieck, for writ of *certiorari* running to the District Court of the County of Hill. Writ denied.

Messrs. Nelson & Turcotte, for Relator, submitted a brief; *Mr. Frank W. Turcotte* argued the cause orally.

No appearance on behalf of Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

A motion for rehearing was granted upon a showing by respondent that through inadvertence the record certified to this court in the first instance was not correct. The record has been corrected in the court below and a supplemental return made. It appears from the record now before us that the order of January 12, 1917, setting aside the default of the defendants in the case of *Anthony Wieck v. F. A. Buttrey and J. W. Wilson*, was made by the court "upon agreement of counsel for plaintiff and defendants made in open court." Under these circumstances there is not any merit in this application.

The order setting aside the default is affirmed.

Affirmed.

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, did not hear the argument and takes no part in the foregoing decision.

DEWELL, APPELLANT, v. NORTHERN PACIFIC RY. CO.,
RESPONDENT.

(No. 3,843.)

DEWELL, RESPONDENT, v. NORTHERN PACIFIC RY. CO.,
APPELLANT.

(No 3,902.)

(Submitted December 8, 1918. Decided January 15, 1918.)

[170 Pac. 752.]

*Railroads—Killing Livestock—Statutes—Constitution—Equal
Protection of Laws—Delegation of Law-making Powers—Stat-
ute of Limitations—Waiver—Costs—Interest.*

Railroads—Killing Livestock—Attorney's Fee—Statute—Constitution.

1. *Held*, that section 4313, Revised Codes, allowing an attorney's fee as part of the costs of plaintiff, in case he is successful, in an action against a railroad company for cattle injured or killed on its tracks, but not allowing it to the company if he is not, is a denial of the equal protection of the laws, and therefore unconstitutional.

Statute of Limitations—Waiver—Stipulation.

2. The defense of the statute of limitations may be waived by stipulation, and if so waived, the agreement will not be set aside on the ground that it was entered into under a mistake as to the law.

Railroads—Killing Livestock—Statutes—Constitution.

3. Section 4312, Revised Codes, which provides that a railroad company shall be liable to the owner of cattle killed or injured on its tracks for failure to keep the record book prescribed in section 4311, and that the court or jury "may in its or their discretion render verdict and judgment for the amount of the value of such animal," etc., is not unconstitutional as delegating law-making powers to the court or jury, i. e., to determine whether the statute shall be effective as a law of the state or not.

Same—Killing Livestock—Record Book—Duty to Keep.

4. The statute imposing upon railway companies operating in the state the duty to keep a record book in which to record the dates on which animals were killed or injured, on railway tracks, their sex, brands, etc. (section 4311, Rev. Codes), is a general police regulation, analogous to one requiring fencing and cattle-guards, and as such valid.

Same—Complaint—Negligence.

5. In an action brought under the provisions of section 4312, holding a railway company liable for cattle killed on its tracks, whether done negligently or not, for failure to keep the record book referred to in paragraph 4 above, plaintiff need not allege or prove negligence.

Same—Failure to Keep Record Book.

6. The fact that the owner of cattle killed has actual knowledge of the killing does not prevent him from invoking the provision of sec-

tin 4312, Revised Codes, which imposes absolute liability for failure to keep the record book prescribed in section 4311.

Appeal and Error—Instructions—Evidence—Harmless Error.

7. The admission of immaterial evidence and the giving of inapplicable instructions, none of which reflected upon the issues up for trial, were harmless.

Costs—Refusal to Allow—When Error.

8. Refusal to allow an item of costs for sheriff's fees and mileage, on the ground that the items were not set forth with sufficient particularity, was error.

Same—Jury—View of Premises.

9. The expense of taking the jury to view the premises is not taxable as costs under Revised Codes, section 7169, in the absence of a custom or rule of court authorizing it.

Same—Cost Bill—*Prima Facie* Correct.

10. The cost bill makes out a *prima facie* case in favor of the items therein contained, the burden of overcoming it being upon the unsuccessful party.

Same—Interest—Jury—Discretion.

11. The allowance of interest in an action for killing cattle on a railway track, lies within the discretion of the jury.

Appeal from District Court, Broadwater County; John A. Matthews, Judge.

ACTION by Scott Dewell against the Northern Pacific Railway Company. From the judgment and certain orders both parties appeal. Order denying new trial affirmed. Judgment modified and affirmed.

Mr. Joseph R. Wine, Jr., for Appellant, submitted a brief and argued the cause orally.

The statute allowing attorneys' fees as a penalty imposed upon railway companies for a violation of a police regulation requiring them to fence their tracks is not unconstitutional. The *Mills v. Olsen Case* (43 Mont. 129, 115 Pac. 33) is the only Montana case known to the writer holding a statute giving attorneys' fees to a successful litigant unconstitutional. That case, as well as a California case cited therein, is based upon the case of *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, 41 L. Ed. 666, 17 Sup. Ct. Rep. 255. That was a case which went to the supreme court of the United States from the state of Texas to test the constitutionality of a statute imposing an attorney's fee not to exceed

ten dollars, in addition to costs upon railway corporations, omitting to pay certain claims within a certain time after presentation, and which applied to no other corporation or individuals. The court held that statute unconstitutional, but specifically excepted cases where the statute imposes a penalty upon the railway company for some duty which it has violated, citing *Missouri Pacific Ry. Co. v. Humes*, 115 U. S. 512, 29 L. Ed. 463, 6 Sup. Ct. Rep. 110. In the latter case it was held that the fencing statute, there considered, does not deprive the company of property without due process of law in allowing the owner of the stock killed to recover damages in excess of its value; nor does it deny to the company the equal protection of the law, and decides that the legislature of the state may fix the amount of damages, beyond compensation, to be awarded to a party injured by the gross negligence of a railroad company, failing to provide suitable fences and guards on its road, or prescribe the limit within which the jury in assessing the damages may exercise their discretion. The additional damages are in the way of punishment to the company for its negligence, and it is not a valid objection that the sufferer instead of the state receives them. (See, also, *Dell v. Marvin*, 41 Fla. 221, 79 Am. St. Rep. 171, 178, 26 South. 188; 1 R. C. L., secs. 115, 135.) In *Kansas City S. Ry. Co. v. Anderson*, 233 U. S. 325, 58 L. Ed. 983, 34 Sup. Ct. Rep. 599, the questions presented by this appeal are decided in appellant's favor. See, also, *St. Louis etc. Ry. Co. v. Wynne*, 224 U. S. 354, 42 L. R. A. (n. s.) 102, 56 L. Ed. 799, 32 Sup. Ct. Rep. 493, distinguished from the case at bar by the *Anderson Case*, *supra*. An analogous case is *Mobile & O. R. R. Co. v. Brandon*, 98 Miss. 461, 42 L. R. A. (n. s.) 106, 53 South. 957. A stronger case, perhaps, than any yet cited, is *Missouri & N. A. R. R. Co. v. State*, 92 Ark. 1, 135 Am. St. Rep. 164, 31 L. R. A. (n. s.) 861, 121 S. W. 930.

Messrs. Gunn, Rasch & Hall and *Mr. W. W. Patterson*, for Respondent, submitted a brief; *Mr. Patterson* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to recover damages for cattle alleged to have been killed by the railway company. Plaintiff appeals from a judgment in his favor, and seeks to have reviewed an order of the trial court striking from his cost bill an item of \$50 claimed as an attorney fee, and an item of \$1.10 for "sheriff's fee serving subpoenas." The defendant appeals from the judgment and from an order denying it a new trial.

1. The court below held that the statute allowing the attorney [1] fee as part of plaintiff's costs is unconstitutional. Section 4308, Revised Codes, requires a railway company to build and maintain a good and legal fence on each side of its line of road, and to maintain cattle-guards at crossings. Section 4309 declares the liability of a railway company for domestic animals killed or injured by reason of the company's negligence in operating its trains, and also prescribes a rule of evidence in such cases. Section 4313 provides: " * * * And whenever any of the livestock referred to in this Chapter shall be injured or killed, as therein recited, and the owner or owners thereof shall thereafter institute an action for the recovery of the loss or damage so sustained by him, or them, the court in which such action shall be brought shall, if the plaintiff in such action recover a judgment against the defendant therein, tax, as part of the costs therein, a reasonable sum to be fixed by the court as a fee to the plaintiff's attorney for conducting said action," *etc.* It is to be observed that this statute allows an attorney fee to the property owner if he is successful in the litigation, but does not allow it to the railway company if it is successful.

In *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150, 41 L. Ed. 666, 17 Sup. Ct. Rep. 255, a statute of Texas having the same purpose in view and very similar in its provisions, was held to violate the Fourteenth Amendment to the Constitution of the United States. That decision is conclusive upon us in this instance. (See, also, *Mills v. Olson*, 43 Mont. 129, 115 Pac. 33.)

The statute is to be distinguished from the one considered in *Doty v. Reece*, 53 Mont. 404, 164 Pac. 542, which awards the attorney fee to the successful litigant, whether plaintiff or defendant; and also from a statute which imposes the attorney fee as a part of the penalty for the violation of a police regulation.

Section 4313 applies as well to an action brought for damages for animals killed by negligent operation of trains as to an action brought for damages arising from a failure to build or maintain fences or cattle-guards. If it applied only to cases arising out of the violation of the police regulation prescribed by section 4308, it would not be open to the attack made upon it; but because it applies equally to ordinary negligence cases, it falls within the class of legislation condemned by the supreme court of the United States in the *Ellis Case*, above.

2. Defendant complains of an order of the trial court denying its application to file an amended answer in which the statute of limitations was pleaded as a defense. The defense is one [2] which may be waived, and an agreement to waive it is valid. (*Parchen v. Chessman*, 49 Mont. 326, Ann. Cas. 1916A, 681, 142 Pac. 631.) The defense had been waived by stipulation, and counsel cannot now be heard to say that it was entered into under a mistake as to the law, and will not be heard to repudiate the agreement, or to insist that its effects be frittered away by the application of ultra technical rules of construction.

3. It is alleged in the complaint and admitted in the answer [3] that the railway company failed to keep a record book and record therein the dates upon which any domestic animals were killed or injured by it, their sex, brands and descriptions, as required by section 4311, Revised Code. Section 4312 declares that for the failure to keep such book and make the required entries, the railway company shall be liable to the owner of any domestic animal killed or injured by it, whether done negligently or not, and then proceeds: "And the court or jury before whom any action is tried for the recovery of damages

on account thereof, may, in its or their discretion, render verdict and judgment for the amount of the value of any such animal or animals so killed, or the amount of damages sustained by reason of any injury thereto."

It is insisted that this section is unconstitutional in that, by its terms, the legislature has delegated law-making authority, *viz.*, the authority to the court or jury to determine whether the statute shall be effective as a law of this state. If by a fair construction of the language of this section it must be said that the authority to make this statute effective, or a dead letter, is lodged in the discretion of the court or jury, then defendant's contention must be upheld, for it is elementary that such authority belongs to the legislature, or to the people under the initiative and referendum, and cannot be delegated.

The statute imposing upon every railway company operating [4] in Montana the duty to keep a record book and make therein a record of every domestic animal killed or injured by it was first enacted in 1881 (Laws 1881, p. 68), and has been upon our statute books ever since. The original Act imposed the duty and prescribed the penalty for noncompliance in a single section. The penalty was liability in double the value of the animal killed. That Act was superseded by another, entitled "An Act to provide for payment for stock killed by the railroads," approved March 10, 1887. (Comp. Stats., Fifth Div., sec. 720 *et seq.*) Section 720 declared the duty in substantially the same terms as the Act of 1881. The penalty for noncompliance was imposed by section 721 in the language now found in section 4312, Revised Codes, and paraphrased above. With slight amendments, not material here, those sections were carried into the Civil Code of 1895 as sections 953 and 954, and into the Revised Codes of 1907 as sections 4311 and 4312. It is fair to presume that the legislative assembly of 1895 had the same purpose in view in writing section 721 into the Codes, as the assembly of 1887 had in enacting the measure in the first instance, and to determine that intention, if possible, we should look to the general character

of the legislation, its history, the title of the Act, and the apparent purpose which it was to subserve.

(a) The character of the Act: We think that the statute is a general police regulation, analogous to one requiring fencing and cattle-guards, and as such its validity cannot be questioned. (*Missouri Pac. Ry. Co. v. Humes*, 115 U. S. 512, 29 L. Ed. 463, 6 Sup. Ct. Rep. 110; *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 125 U. S. 26, 32 L. Ed. 585, 9 Sup. Ct. Rep. 207.) The statute was evidently designed to promote the welfare of the state by protecting its livestock industry—one of the principal industries of the commonwealth. At the time it was enacted, vast areas of Montana were given over exclusively to general range purposes. The lands were not fenced. Herds of cattle roamed about at will. The railroads were not then required to inclose their tracks, and, in the absence of some positive law requiring evidence of the fact to be preserved, the death of an animal killed by a railroad would ordinarily never become known to the owner. As soon as the carcass was buried by the employees of the road, all trace of the wrongful act, if any, disappeared, and the owner was deprived of his property, and to all intents and purposes was without remedy. While it is true that keeping the book and making the required entries would not tend directly to increase the safety of domestic animals running at large, the fact that the record was available as evidence against the road would tend to promote a higher degree of care in its operation to the ultimate benefit of the industry, and thus, by indirection at least, the purpose of the Act was to be accomplished. That the state may, in the exercise of its police power, protect and promote one of its principal industries cannot be gainsaid. Assuming the existence of the power, any reasonable means may be adopted for its exercise. If the purpose to be served is within the control of police power of the state, and the statute in question reasonably effectuates that purpose, the particular phraseology of the Act is of no great consequence.

In its facts this case is altogether dissimilar from *Colvill v. Fox*, 51 Mont. 72, L. R. A. 1915F, 894, 149 Pac. 496, *Hill v. Rae*,

52 Mont. 378, Ann. Cas. 1917E, 210, L. R. A. 1917A, 495, 158 Pac. 826, and *Noble State Bank v. Haskell*, 219 U. S. 104, Ann. Cas. 1912A, 487, 32 L. R. A. (n. s.) 1062, 55 L. Ed. 112, 31 Sup. Ct. Rep. 186, but in our opinion the broad, general principle underlying each is the same, and this statute may be upheld as a valid police regulation.

In order to enforce the duty to keep this book and make the required record, the legislature was free to prescribe appropriate penalties; and the mode of enforcing the statute, whether at the suit of a private party or by public prosecution, and the disposition to be made of the amount collected, are merely matters of legislative discretion. (11 R. C. L. 891.)

It cannot be said that this statute imposes liability notwithstanding the railway company is without fault. The liability is imposed as the means of enforcing obedience to the law. If the book is kept and the proper entries made, the rule of absolute liability does not obtain. In this respect the statute is different from the one considered in *Bielenberg v. Montana Union Ry. Co.*, 8 Mont. 271, 2 L. R. A. 813, 20 Pac. 314, and more nearly like the one considered in *Diamond v. Northern Pac. R. Co.*, 6 Mont. 580, 13 Pac. 367.

(b) History of the Act: From 1881 to the present time, the duty to keep the book and make the required record has been an absolute one. From 1881 to 1887 the penalty for nonobservance of the duty was expressed in language too clear to admit of a doubt as to its meaning. Every violation subjected the offending company to liability for double damages. Section 721 itself declares that for such a violation the company "shall be liable to the owner or owners of the animal or animals so killed or injured whether negligently done or not." This language, if standing alone, would clearly evidence an intention to establish a rule of absolute liability in every case of nonobservance of the law. Long prior to the enactment of any of these statutes, experience had demonstrated that a police regulation without a penalty of some character for its breach was ineffectual for any purpose, and in view of this fact and the language quoted above,

we cannot believe that in substituting section 721 for the penalty clause of the Act of 1881, the legislature meant to leave to the caprice of court or jury whether the statute declaring the duty should or should not be entirely impotent.

(c) The title of the Act declares the purpose to be to provide for the payment of stock killed by railroads. In the absence of any certain, fixed liability for the violation of this Act, the stock owner had only his common-law action for damages for negligence, and the title would belie the purpose of the Act. In other words, if this Act does not create a liability, it accomplishes no purpose whatever.

(d) The apparent purpose of the Act: As already observed, the Act of 1881 fixed the measure of damages, and imposed the rule of double liability. In our opinion, by the concluding sentence of section 721 (4312) the legislature made a crude, clumsy attempt to substitute the rule of single liability or actual damages for the harsher rule of the original Act, leaving to the court or jury, as the case may be, a wide latitude for determining the amount of recovery in any given case.

4. By the express terms of this Act, it was not necessary for [5] plaintiff to allege or prove negligence. In this respect our statute differs from the statute of Idaho considered in *Wilson v. Oregon S. L. R. Co.*, 28 Idaho, 54, 152 Pac. 1062.

5. The penalty—absolute liability—is imposed to secure [6] obedience to the law, and the fact that the plaintiff had actual knowledge that his animals had been killed does not prevent him invoking the statute in this case. The Act makes no exception as against the owner who has actual knowledge, and we are not authorized to supply such exception. (*Memphis & Little Rock R. Co. v. Carlley*, 39 Ark. 246.)

6. There was an apparent attempt also to predicate liability upon the failure of the railway company to maintain sufficient [7] fences and cattle-guards; but there is no causal connection disclosed between the alleged negligence and the death of the cattle. The only issues presented for trial arose upon the questions of ownership of the cattle, their value, and whether they

were killed by the defendant company. The general verdict returned found every one of these issues in favor of the plaintiff, and upon any theory of the case such a finding was necessary to warrant a recovery; and though immaterial evidence was admitted upon the trial, and instructions were given which were not applicable, neither reflected upon the issues actually for trial, and the technical errors could not have prejudiced the rights of the defendant.

7. Costs: The trial court refused to allow plaintiff an item of [8] costs amounting to \$1.10 for sheriff's fees and mileage, upon the theory that the cost bill did not set forth the items with sufficient particularity. In this the court erred. (*Brande v. Babcock Hardware Co.*, 35 Mont. 256, 119 Am. St. Rep. 845, 88 Pac. 949.) The court also erred in allowing as costs the [9] expense of taking the jury to view the premises where the cattle were killed. Such expense is not taxable as costs under section 7169, Revised Codes, in the absence of a custom or rule of court authorizing it. (*Montana O. P. Co. v. Boston & Montana Co.*, 27 Mont. 288, 70 Pac. 1126.) The cost bill itself made [10] out a *prima facie* case in favor of the other items, and imposed upon the defendant the burden of overcoming it. (*Kelly v. City of Butte*, 44 Mont. 115, 119 Pac. 171.) This it failed to do.

8. Interest was properly allowed. It was within the discretion [11] of the jury to allow interest, and such discretion was exercised in plaintiff's favor. (Sec. 6044, Rev. Codes; *Caledonia Ins. Co. v. Northern Pac. Ry. Co.*, 32 Mont. 46, 79 Pac. 544.)

The order overruling the motion for a new trial is affirmed. The cause is remanded to the district court, with directions to reduce the amount of costs included in the judgment by \$3.90, and as thus modified the judgment will stand affirmed. Each party will pay his own costs of these appeals.

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

STANHOPE, APPELLANT, v. SHAMBOW ET AL., RESPONDENTS.

(No. 3,859.)

(Submitted January 11, 1918. Decided January 18, 1918.)

[170 Pac. 753.]

*Infants—Contracts — Disaffirmance — Notice—“Restoration”—
Principal and Surety.**Infants—Disaffirmance of Contracts—Restoration of Consideration.*

1. An infant may disaffirm the contracts made by him (other than those mentioned in sections 3593 and 3594), during infancy or within a reasonable time after reaching majority, provided he first makes restoration of the consideration, thus placing the other party *in statu quo*.

Same—Restoration—Release of Surety.

2. Where an infant purchaser of an automobile disaffirmed his contract of purchase and made complete restoration by redelivering it in substantially the same condition as when he bought it, both he and his sureties were discharged from further liability.

Same—Disaffirmance—Notice—Sufficiency.

3. Since no particular form of disaffirmance of a contract by an infant is prescribed by section 3592, Revised Codes, a notice to the seller amounting to an unequivocal act on the infant's part of his intention to avoid the sale was sufficient.

Same—Restoration—What Constitutes.

4. Redelivery of an automobile at the same place at which it was sold and delivered to the buyer—which was the seller's place of business—constituted a restoration within the meaning of section 3592, authorizing an infant to disaffirm certain contracts.

[As to when disaffirmance of contract by infant must be accompanied by return of consideration, see notes in 62 Am. Dec. 734; 46 Am. Rep. 28.]

Same—Principal and Surety—Evidence.

5. In an action between the original parties to a contract, it is competent to show that the purchaser of an automobile was the principal and each of the other defendants a surety only.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

ACTION by L. H. Stanhope against W. A. Shambow and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Messrs. Canning & Geagan and Mr. E. P. Kelly, for Appellant, submitted a brief; Mr. F. E. Geagan argued the cause orally.

Though the defendant N. A. Shambow, under his plea of infancy, might be held to be exempt from payment of the note,

still it appears to us to be the settled law of contracts that even though one of the makers of a contract, such as the one in question, may be an infant and be entitled on that account to exemption from performance, his adult comakers are not so exempt. (1 Elliott on Contracts, sec. 288; 1 Randolph on Commercial Paper, sec. 278; *Cole v. Manners*, 76 Neb. 454, 107 N. W. 777; *Hartness v. Thompson*, 5 Johns. (N. Y.) 160; *Cutts v. Gordon*, 13 Me. 474, 29 Am. Dec. 520; *Taylor v. Dansby*, 42 Mich. 82, 3 N. W. 267; *Parker v. Baker*, 1 Clarke Ch. (N. Y.) 136; 7 Cyc. 655.) In the case of *Magee v. Welsh*, 18 Cal. 155, the husband of an infant wife was held liable on a note, while the wife was released from payment on account of infancy. (See, also, 22 Cyc. 610; Daniel on Negotiable Instruments, 6th ed., sec. 238; *Atkinson v. Weidner*, 83 Mich. 412, 47 N. W. 317; *Craig v. Van Bebbber*, 100 Mo. 584, 18 Am. St. Rep. 569, 609, 13 S. W. 906.)

Defendant N. A. Shambow did not at any time return to the plaintiff the automobile. He brought it to Butte, left it in a garage, left Butte without seeing plaintiff or telling him anything about it, wrote him a letter from Dillon telling him he had left the automobile at the garage and that it was at plaintiff's disposal—or words to that effect. Such acts do not constitute a return of the property. (*Berlin Machine Works v. Midland Coal & L. Co.*, 45 Mont. 390, 123 Pac. 396; *Jones v. Armstrong*, 50 Mont. 168, 145 Pac. 949.)

Mr. Edwin M. Lamb and Messrs. Pease & Stephenson, for Respondents, submitted a brief.

In *Keokuk County State Bank v. Hall*, 106 Iowa, 540, 76 N. W. 832, on a suit against the infant maker of a note and his sureties, evidence was offered to prove a disaffirmance and return of the property purchased, which the court excluded. Judgment for the plaintiff reversed, the court saying: "The general rule is that where a party becomes surety for an infant, he is bound, though his principal is not. (*Jones v. Crossthwaite*, 17 Iowa, 393; *Allen v. Berryhill*, 27 Iowa, 534, 1 Am. Rep. 309; 1 Brandt on Suretyship, sec. 153.) But to this as to most other

rules there are exceptions. When the principal disaffirms the contract, and returns the consideration received under it, the surety is thereby discharged. (1 Brandt on Suretyship, sec. 153; *Baker v. Kennett*, 54 Mo. 82; *Patterson v. Cave*, 61 Mo. 439.)'' (See, also, *Seeley v. Seeley-Howe-Le Van Co.*, 128 Iowa, 294, 103 N. W. 961.)

Replying to the contention that no restoration of the property was made by W. A. Shambow, the answer is simple: The appellant made it plain prior to the commencement of the action that he would not accept the car if tendered to him. His letter distinctly repudiates any obligation on his part to receive it, or any intent to do so, but insists upon his right to collect the full amount of the note. It would have been sufficient for Shambow, in that case, to have retained the car subject to the order of the appellant. (*Armstrong v. Poe*, 35 Mont. 557, 90 Pac. 758; *Jones v. Valentines' School of Telegraphy*, 122 Wis. 318, 99 N. W. 1043; *Potter v. Taggart*, 54 Wis. 395, 11 N. W. 678; *House v. Alexander*, 105 Ind. 109, 55 Am. Rep. 189, 4 N. E. 891.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In September, 1913, plaintiff sold and delivered to W. A. Shambow a second-hand automobile, receiving as evidence of the purchase price a promissory note signed by the purchaser and the other defendants. After certain payments were made on the note, and in April, 1914, the purchaser returned the car to Butte and notified the seller that he refused to complete the transaction and that he disaffirmed the contract on the ground of his minority at the time the sale was made. This action was commenced to enforce payment of the balance due on the note. Breach of warranty and infancy were the defenses pleaded, but the former was abandoned at the trial. The plaintiff has appealed from a judgment in favor of the defendants.

An infant is bound by his contract to pay the reasonable value of necessities furnished to him. (Rev. Codes, sec. 3593.) He is

[1] also bound by a contract entered into by him under express authority or direction of a statute. (Sec. 3594.) Any other contract of a minor may be disaffirmed during infancy or within a reasonable time after reaching majority, provided the infant restores the consideration to the party from whom it was received. (Sec. 3592.) In other words, restoration of the consideration is made a condition precedent to his right to disaffirm. These statutory rules determine the liability of a minor in this state, and any discussion of the subject based upon the common law or the law-merchant is altogether beside the question.

By "restoration" is meant that the other party to the contract is placed *in statu quo*. If, then, the purchaser delivered back [2] the automobile in substantially the same condition as when it was purchased, plaintiff cannot contend that he is also entitled to the purchase price of the car. He is entitled to one or the other, but not to both, and the choice is at the election of the infant. If there was a disaffirmance and restoration, the obligation was discharged, the claim was satisfied, and the infant and his sureties were released, for there was no longer any consideration for the promise. (*Keokuk County State Bank v. Hall*, 106 Iowa, 540, 76 N. W. 832; *Evants v. Taylor*, 18 N. M. 371, 50 L. R. A. (n. s.) 1113, 137 Pac. 583.)

The law looks to the substance rather than the form. No [3] particular form of disaffirmance is prescribed. The notices of April 16 and 27 informed the vendor of the infant's intention not to complete the transaction. They amounted to an unequivocal act on his part by which his intention to avoid the sale was made known to the seller, and were sufficient. (14 R. C. L., p. 236.)

Appellant insists that the evidence fails to disclose that the [4] car in question was ever restored to him. In this instance, restoration meant redelivery. The record discloses these facts: Plaintiff was an automobile dealer and ran cars for hire. He kept his cars in the Butte Automobile Garage, and it was at this garage that the car in question was delivered to the purchaser when the sale was made, and it was to this same garage that

the car was returned when the purchaser undertook to restore it to the plaintiff. So far as the record discloses, plaintiff had no other place of business. He testified that he paid to the garage owner rental for the storage of his cars; but there is not any evidence that any charges accrued against this car from the time it was left by the purchaser, until plaintiff received notice and had a reasonable opportunity to arrange for its disposition, or that the garage owner had any claim against or lien upon it. When the contract of sale was made in the first instance, the law imposed upon the seller the duty to deliver the car to the purchaser. (Sec. 5097, Rev. Codes.) In the absence of any agreement to the contrary, the place of delivery was the place where the car was at the time of the sale. (Sec. 5098.) Since this car was at the Butte Automobile Garage at the time of the sale and there was not any agreement for delivery at a different place, the garage was, in contemplation of law, the place of delivery. In fact, the car was delivered to the purchaser at that particular place, and since it appears, *prima facie*, that the garage was plaintiff's place of business, a redelivery of the car to the same place with notice to plaintiff of the fact of such delivery constituted a restoration of the car to the plaintiff.

This action is between the original parties to the contract, and [5] it was therefore competent to show that W. A. Shambow was principal and each of the other defendants a surety only (sec. 5681), and, notwithstanding plaintiff testified that he acted on the faith of the apparent character of Allensworth and Duff as principals, the correspondence passing between plaintiff and the purchaser permitted the trial court to draw the conclusion that he did not do so. For instance, in his letter of April 24, plaintiff wrote to W. A. Shambow: "In reply to your letter of April 16 will say, regarding the car referred to in your letter, when I sold this car to you, I took your note with security, giving you a bill of sale of the car, and therefore retaining no interest in this car, whatever. I took your note with the other signatures as pay for this car, you having the privilege of paying this in monthly payments as long as the payments were made promptly,

but in this particular you have failed, therefore compelling me to proceed to collect this note from you and your guarantors.” The record tends to show that the car was returned in substantially the same condition as when purchased. Plaintiff makes no contention to the contrary, but practically acknowledges the fact in the letter referred to above.

Complaint is made that the trial court refused to permit plaintiff, on cross-examination of the purchaser, to show that this car had been used by the purchaser in the conduct of his business, but the record does not justify the complaint; on the contrary, it discloses that plaintiff was permitted to interrogate the purchaser at length with reference to the character and extent of the use of the car by him.

The record further discloses that upon the trial the purchaser, through his guardian, waived any claim for damages or for the return of the money paid on the note. Plaintiff has the car and \$467.50—the amount of such payments. Since it appears that full and complete restoration was made, plaintiff cannot defeat the minor’s right to disaffirm the contract by his refusal to accept the car.

The judgment is affirmed.

Affirmed.

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

**MORELLI, APPELLANT, v. TWOHY BROS. CO. ET AL.,
RESPONDENTS.**

(No. 3,860.)

(Submitted January 11, 1918. Decided January 23, 1918.)

[170 Pac. 757.]

Personal Injuries—Master and Servant—Fellow-servants—Vice-principal—Safe-place Rule—Mines and Tunnels—Assumption of Risk—Nonsuit.

Trial—Nonsuit—What Deemed Proved.

1. On motion for nonsuit, every fact is deemed proved which the evidence tends to prove.

Same—When Nonsuit not to be Granted.

2. Nonsuit should not be granted if, viewed in the light most favorable to plaintiff, the evidence makes out a *prima facie* case.

[As to mere *scintilla* of evidence as sufficient to justify submission of cause to the jury, see note in *Ann. Cas.* 1914B, 472.]

Same.

3. A case should never be withdrawn from the jury unless it follows as a matter of law that recovery cannot be had upon any view of the evidence, including the legitimate inferences to be drawn from it.

Personal Injuries—Master and Servant—Fellow-servant—Vice-principal.

4. Under the law of master and servant, a foreman may occupy the dual position of a fellow-servant with reference to certain work, and of the *alter ego* of the master in the doing of other acts and things, his status as either depending upon the character of his service and not upon the title he may bear.

Same—Safe-place Rule—Applicability.

5. The safe-place rule is as applicable where the working place is constantly being changed by the labor of the servant himself,—as, for instance, in tunneling work,—as in any other, the degree of care required of the master with reference to a completed place in such a case being modified to the extent that the changing conditions wrought by the servant lessen his opportunities under the rule and increase the assumed risks of the servant.

Same—Fellow-servant—Vice-principal.

6. A tunnel foreman whom plaintiff and his fellow-workmen were compelled to obey under penalty of discharge was the master's vice-principal, and not a fellow-servant.

Same—Assumption of Risk.

7. Assumption of risk implies knowledge, or the means of knowledge, and appreciation of the danger on the part of the servant.

Same—Duty of Servant to Obey—Safe Place—Presumptions.

8. Where a servant is ordered from place to place in a tunnel, he must obey, and cannot stop to examine whether his working place is safe; he has a right to presume that the master has performed his duty to see that it is safe.

Same—Making Dangerous Place Safe—Assumption of Risk.

9. Plaintiff was employed both as a miner and a timberman. He was injured by a fall of rock while working in the latter capacity, after a shot had been fired, and he and his fellow-workmen excluded from the tunnel during the time the foreman undertook to make the place safe for timbering. *Held*, that he was not prevented from recovering damages, under the principle that he assumed the risk of injury while making a dangerous place safe.

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

ACTION by Peter Morelli against the Twohy Bros. Company and another. From an order denying a new trial after judgment of nonsuit, plaintiff appeals. Reversed and remanded.

Mr. E. K. Cheadle and *Mr. Rudolf Von Tobel*, for Appellant, submitted a brief; *Mr. Cheadle* argued the cause orally.

The trial court sustained the motion of defendants for nonsuit upon two grounds, as stated in his ruling, namely: That plaintiff was engaged in making a dangerous place safe, and that the foreman was a fellow-servant of plaintiff. In doing so it committed error. (See *McAllister v. Rocky Fork Coal Co.*, 45 Mont. 433, 123 Pac. 696; *Chicago, Milwaukee & St. Paul Ry. Co. v. Ross*, 112 U. S. 377, 28 L. Ed. 787, 5 Sup. Ct. Rep. 184; *Gregory v. Chicago, Milwaukee & St. Paul Ry. Co.*, 42 Mont. 551, 113 Pac. 1123; *Corn Products Refining Co. v. King*, 168 Fed. 892, 94 C. C. A. 304; *Smith v. Illinois Collieries Co.*, 155 Ill. App. 148; *Wahlquist v. Maple Grove Coal & Min. Co.*, 116 Iowa, 720, 89 N. W. 98; *Hamm v. Bettendorf Axle Co.*, 147 Iowa, 681, 125 N. W. 186; *Jacobson v. Hobart Iron Co.*, 103 Minn. 319, 114 N. W. 951; *Griffin v. Fredonia Brick Co.*, 84 Kan. 347, 40 L. R. A. (n. s.) 1088, 114 Pac. 217; *Reid Coal Co. v. Nichols* (Tex. Civ. App.), 136 S. W. 847.)

Mr. Chas. J. Marshall, for Respondents, submitted a brief, and argued the cause orally.

It is not the duty of the master to warn the servant of dangers of which the master does not know, or to warn him of dangers

of which the servant is already aware. (*Therriault v. England*, 43 Mont. 376, 116 Pac. 581; *Kuphal v. Western Montana Flouring Co.*, 43 Mont. 18, 114 Pac. 122; *Forquer v. Slater Brick Co.*, 37 Mont. 426, 97 Pac. 843.) It is the duty of the master to warn the servant of dangers, unless they are known and appreciated by the latter, or so obvious that a reasonable man would have known and appreciated them. (*Domitrovich v. Stone & Webster Engr. Corp.*, 44 Mont. 7, 118 Pac. 760.) A servant assumes all the usual and ordinary risks attendant upon his employment, not including risks arising from negligence of the master, and he assumes the latter as well if he knows of the defects from which they arise and appreciates the dangers which flow from such defects. (*Fotheringill v. Washoe Copper Co.*, 43 Mont. 485, 117 Pac. 86.) The appellant assumed the risk in this instance, he having equal opportunity with the shift boss of obtaining knowledge of the conditions prevailing. (*Thurman v. Pittsburg & Mont. C. Co.*, 41 Mont. 141, 108 Pac. 588; *McQueeny v. Chicago, M. & St. P. Ry.*, 120 Iowa, 522, 94 N. W. 1124; *Larsson v. McClure*, 95 Wis. 533, 70 N. W. 662; *Showalter v. Fairbanks Co.*, 88 Wis. 376, 60 N. W. 257; *Wright v. Pacific Coast Oil Co.*, 6 Cal. Unrep. 84, 53 Pac. 1086; *Walker v. Scot*, 67 Kan. 814, 64 Pac. 615; *Labatt's Master and Servant*, sec. 1177.)

Where a person is working at an occupation the prosecution of which creates the dangers, he assumes the ordinary risks of the dangers which he has created. (*Thurman v. Pittsburg & Mont. C. Co.*, 41 Mont. 141, 108 Pac. 588; *Shaw v. New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515; *Friel v. Kimberly-Mont. Gold Min. Co.*, 34 Mont. 54, 85 Pac. 734.) The servant assumes risk from changing condition of working place during progress of work. (*Omaha Packing Co. v. Sanduski*, 155 Fed. 897, 19 L. R. A. (n. s.) 359, 361, 84 C. C. A. 89.) Actual knowledge of servant of danger is not necessary in order that he assume the risk. If the circumstances are such that a reasonably prudent man ought to have known of the danger he will be charged with the knowledge. (*Anderson v. Northern Pac. Ry. Co.*, 34 Mont. 181, 85 Pac. 884; *Molt v. Northern Pac. Ry.*

Co., 44 Mont. 471, 120 Pac. 809.) A servant, who, from the length or character of previous service or experience may be presumed to know the ordinary hazard attending the proper conduct of a certain business, is not entitled, as an absolute right, to the same or similar notice of dangers incident to the employment, as if he were ignorant of, or inexperienced in, the particular work. (*Omaha Bottling Co. v. Thieler*, 59 Neb. 257, 80 Am. St. Rep. 673, 80 N. W. 821; *Weed v. Chicago, St. P. M. & O. R. Co.*, 5 Neb. Unof. 623, 99 N. W. 827; *Central Granaries v. Ault*, 75 Neb. 249, 106 N. W. 418, 107 N. W. 1015.) The duty of caring for the safety of a place in cases in which the work the servants are employed to do, necessarily changes the character of the place as to safety, as the work progresses, is a duty of the servants to whom the work is intrusted, and it is not the duty of the master. (*American Bridge Co. v. Seeds*, 144 Fed. 605, 11 L. R. A. (n. s.) 1041, 75 C. C. A. 407.) The term "assumed risk" includes generally any form of assumed risks, that is to say, risks ordinarily incident to the work, as well as the risks not so incident but arising from the circumstances that the danger was a known one. (*International & G. N. R. Co. v. Moynahan*, 33 Tex. Civ. App. 302, 76 S. W. 803, 804.) The defense of assumption of risk is founded on contract and may be interposed against a servant, not because he agreed, but because it is a part of the law, which if abrogated must be by the legislature. (*Fotheringill v. Washoe Copper Co.*, 43 Mont. 485, 117 Pac. 86; *Faulkner v. Mammoth Min. Co.*, 23 Utah, 437, 66 Pac. 799, 801.)

A place under construction and constantly changing by the acts of the plaintiff or his fellow-servants is not such a place as the law requires the master to keep safe. (*Shaw v. New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515; *Allen v. Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673; *Lindvall v. Woods*, 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020; *Allen v. Bell*, 32 Mont. 69, 79 Pac. 582; *Poorman Silver Mines v. Devling*, 34 Colo. 37, 81 Pac. 252; *Kallio v. Northwestern Imp. Co.*, 47 Mont. 314, Ann. Cas. 1915A, 1228, 132 Pac. 419; *Labatt's Master and Ser-*

vant, 1517, secs. 587, 588.) Appellant cannot complain of the unsafety of a place which it is his duty to make safe, as appellant was employed to make the place safe by timbering. (*Thurman v. Pittsburg & Mont. C. Co.*, *supra*; *New Omaha, Thompson-Houston E. L. Co. v. Rombold*, 68 Neb. 54, 93 N. W. 966, 97 N. W. 1030; *Metallic Gold Min. Co. v. Watson*, 51 Colo. 278, Ann. Cas. 1913A, 1276, 117 Pac. 609, 611; *Kellogg v. Denver City Tramway Co.*, 18 Colo. App. 475, 72 Pac. 609; *Labatt's Master and Servant*, 2791.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

About July 9, 1913, Peter Morelli, a workman employed by Twohy Bros. Company (a corporation) in driving a tunnel on the line of the Chicago, Milwaukee & St. Paul Railway, was injured while in the discharge of his duties. He brought this action to recover damages, but at the conclusion of his testimony the court granted a motion for nonsuit, withdrew the case from the jury, and rendered judgment dismissing his complaint. From an order denying him a new trial, plaintiff appealed.

On motion for nonsuit every fact is deemed to be proved which [1-3] the evidence tends to establish, and if, viewed in the light most favorable to plaintiff, the evidence makes out a *prima facie* case, it follows that the trial court erred in granting the nonsuit. (*Moran v. Ebey*, 39 Mont. 517, 104 Pac. 522.) A case should never be withdrawn from the jury unless it follows as a matter of law that recovery cannot be had upon any view of the evidence, including the legitimate inferences to be drawn from it. (*Roach v. Rutter*, 40 Mont. 167, 105 Pac. 555.)

The plaintiff is a foreigner whose broken English is most difficult to understand. His testimony covers more than fifty pages of the transcript and requires a critical analysis to determine its effect. From the unequivocal statements of the witness and from the inferences fairly deducible from his testimony in its entirety, we find these facts:

Plaintiff and three other workmen, in sets of twos, first ran a drift on each side of the tunnel for a distance of twenty-five feet or more. They then drilled a set of holes in each drift about four feet back from the face or breast of the tunnel, and charged them ready for blasting. They were then dismissed from the tunnel by the foreman, who fired the holes. When the smoke and gas escaped, the foreman went into the tunnel, examined and tested the untimbered walls and also the breast, and picked down any loose rock which might fall and cause injury. When he had satisfied himself that the working place was reasonably safe, he ordered the plaintiff and other workmen to bring in the timbers which he assisted in putting in place. This order was followed on the day of the accident. After the foreman had assumed to pick down the loose rock he assured plaintiff and his coworkers that everything was all right, and ordered them to bring in the timbers, emphasizing the fact that he was in a hurry to get the set in place before the next shift came on duty. While putting this set of timbers in place, a rock from the breast of the tunnel fell upon the plaintiff, causing the injuries of which he complains. There was another officer over the foreman, but he never came in contact with the workmen and, so far as disclosed by this record, he was not in or about the tunnel at any time while the plaintiff was on duty. The foreman directed all the work of the men on his shift, ordered them when and where to work and what to do. He excluded them from the tunnel from the time the holes were loaded until he was ready to have the timbers set in place. The men under him, including plaintiff, were compelled to obey his orders under penalty of being discharged by him. The men received orders from no one else. He was apparently in exclusive control of the work while his shift was on duty, and it was upon his orders and under his directions that the work progressed. With reference to the particular tasks before his shift, the will of the foreman was supreme.

If we assume that while engaged in manual labor in setting [4] the timbers in place, the foreman was a fellow-servant of

the plaintiff in that particular work, it does not follow that he maintained that character with respect to the rest of the employment. One may occupy a dual position, as a common laborer with reference to certain work, and as the *alter ego* of the master in the performance of other acts and things. (Woods on Master and Servant, pp. 860, 863; 4 Thompson's Commentaries on the Law of Negligence, sec. 4918.) During the time the drifts were being run, the holes drilled and loaded, the foreman was apparently not a laborer, but the directing head. He was called "foreman," "boss," "shift boss," and "timber boss" indifferently. For convenience only we refer to him as foreman. But if he had been called "governor," "general manager," or "lackey," it would not have altered the situation or changed the character of his duties.

"What's in a name? That which we call a rose
"By any other name would smell as sweet."

His status as fellow-servant or vice-principal does not depend upon his lowly or high-sounding title, but upon the character of his service. (*Gregory v. Chicago, M. & St. P. Ry. Co.*, 42 Mont. 551, 113 Pac. 1123.) It is unfortunate that courts and text-writers should confuse the law by assuming to state as an abstract proposition that a foreman or shift boss is a fellow-servant of the men working under him. He may be a fellow-servant while he is performing acts of the common employment, as distinguished from acts which it is the duty of the master to perform; but no matter how menial his services, whenever he is required to perform a primary duty of the master, he becomes the master's *alter ego* for the performance of such service. In the absence of anything to indicate the contrary, it will be presumed that the duties which the foreman performed were the duties which his employment imposed upon him. The principal duty performed by him with which we are now concerned was directed to making reasonably safe the working place for the men engaged in setting the timbers. If this was a primary duty of the master, the person to whom its performance was delegated was *pro hac vice* the *alter ego* of the master for whose negligence

the master was liable. If the duty was present, it was either performed by the foreman or it was not performed at all.

There is not any controversy over the rule affecting the master's duty to exercise reasonable care to furnish his servant a [5] reasonably safe place in which to work; but it is contended that the rule has no application where the working place is changing constantly by the labor of the servant himself; in other words, there is no safe-place rule applicable under these circumstances, and support for this contention is found in broad, general expressions to that effect in numerous decisions, including some of our own. Indeed, the trial court with propriety might have justified its ruling by reference to the former decisions of this court if the language employed in them be accepted literally. Typical of those cases is *Shaw v. New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515, wherein it is said that the safe-place rule should have no application to a case wherein it appears that the working place is changing continually by the labor of the men working upon it. Clearly this language has a broader significance than the meaning intended to be conveyed. To accept it literally would establish a rule of absolute nonliability of the master in practically every case of injury arising in mining, tunnel work and other underground operations, caisson work, construction work, the work of demolishing buildings, or any other work involving constant changes in the place of work itself. Such a rule might be exceedingly convenient to the master, but it would be inhumane to the workmen.

In 3 Labatt on Master and Servant, section 924, in speaking of these broad statements which at first blush seemingly suspend the rule in so large a percentage of negligence cases, the author says: "But it cannot be intended to concede this unqualified immunity to the master. Such a view is expressly repudiated in many cases and impliedly in many others." Among the cases referred to is *Allen v. Bell*, 32 Mont. 69, 79 Pac. 582, wherein liability was held to attach, notwithstanding the place of work was changing constantly by the efforts of Allen and his cowork-

ers. (See, also, *Kinsel v. North-Butte Min. Co.*, 44 Mont. 445, 120 Pac. 797.)

Whatever other courts may have intended by their use of such general language, the confusion in this state has arisen over the unfortunate form of expression, rather than over the principle intended to be stated; but, even if a reversal of our former decisions upon this point is necessarily involved, we content ourselves with saying that it is more desirable that the court be right than that its decisions harmonize in all respects.

It is to be remembered that we are now considering a common-law action, and that the safe-place rule is a rule of the common law. The common law makes no such exception in the application of the rule, and the courts are without authority to do so.

The employer is not an insurer of the safety of his workmen. He is required to exercise only ordinary care to provide for them a reasonably safe place for work, a place as reasonably safe as is compatible with its nature and surroundings. (*Masich v. American Smelting & R. Co.*, 44 Mont. 36, 118 Pac. 764, 2 N. C. C. A. 101.) But what is ordinary care in one instance may be gross negligence in another. The degree of care which would insure absolute safety to a workman employed in a tunnel driven through solid granite might make a veritable death-trap of a tunnel in loose rock or earth. The degree of care commanded by the rule is measured by the danger to be anticipated, the risk to be incurred, and the opportunity available for securing the workman's safety. A reasonably safe place presupposes such a condition as ordinary care, skill and diligence will secure under all the surrounding circumstances. The presence of constantly changing conditions in the working place does not operate to suspend the rule. It may vary the effects of the master's care, but it cannot operate to relieve him of all responsibility. His duty is not altered, but the degree of care required of him with reference to a completed place will be modified to the extent that the changing conditions wrought by the workman lessens his opportunities under the rule and increases the assumed risks of the servant.

Speaking of the application of the safe-place rule to a working place constantly changed by the labors of the servant, the supreme court of Washington said: "But the servant does not assume the risk of every danger even in such cases. As in other cases, he assumes the risk of such dangers only as are necessarily incident to the work. The difference is not in the rule, but in the greater number of dangers incident to the work. The real question in any case is as to what constitutes reasonably careful conduct on the part of the master looking to reasonable safety for the men." (*McLeod v. Chicago, M. & P. S. Ry. Co.*, 65 Wash. 62, 117 Pac. 749; see, also, Labatt, sec. 924, above.)

The observation of the court in the *Gregory Case* cited above [6] may be paraphrased and applied here. Under this rule, the foreman being the responsible agent of the company in carrying forward the work at the tunnel and for the time being in exclusive control so far as plaintiff was concerned, and performing a nondelegable duty, represented the master and was its vice-principal. (See, also, *Vasby v. United States Gypsum Co.*, 46 Mont. 411, 128 Pac. 606.)

The servant assumes the ordinary risks of his employment (sec. 5243, Rev. Codes), and though it may be conceded for the [7-9] purposes of this appeal that as a miner running the drifts and drilling and loading the holes, plaintiff assumed the risks arising from the constantly changing character of his working place, so far as his employment permitted him an opportunity to examine the same or make alterations looking to his greater security, it cannot be said that he likewise assumed the risk of injury from rocks falling from the breast of the tunnel when he had no opportunity for examination or correction, was excluded from the tunnel before the blasts were discharged which loosened the rocks, and was not permitted to re-enter until he was required to engage in other work. Assumption of risk implies knowledge or the means of knowledge, and appreciation of the danger. (*Alexander v. Great Northern Ry. Co.*, 51 Mont. 565, 154 Pac. 914.)

In no sense of the term can it be said that plaintiff was engaged in making a dangerous place safe. The breast of the tunnel was the dangerous place in this instance; but the timbering was designed to support the walls and roof, not the breast, which was being changed constantly as the work of excavation progressed. It is not difficult to imagine what progress would have been made in the excavation and timbering of this tunnel if every laborer engaged upon it had been his own boss, free to stop the work until by experimenting to his own satisfaction he had convinced himself that his working place was reasonably safe. In every enterprise of any magnitude where a considerable number of men are engaged upon the same work, it is not merely the privilege, but the duty, of the master to give orders and direct the places where the servant shall work, and the duty of obedience to such orders is imposed upon the servant, unless it is obvious that obedience would subject him to unusual dangers. (4 Labatt, sec. 1449d.) The safety of the workmen, as well as the dispatch of the business, requires that the master shall order and the servant obey, for upon no other basis would it be practical to carry forward work of any consequence. When a servant is ordered from one part of the work to another he cannot be expected to stop, examine and experiment for himself to ascertain whether his working place is safe. He has a right to presume that the master has performed his duty. (*Hardesty v. Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29; *Schroder v. Montana Iron Works*, 38 Mont. 474, 100 Pac. 619.) The obligation of the servant begins where the duty of the master ends.

The facts of this case are somewhat peculiar. The plaintiff was engaged in a dual capacity—as miner and as timberman. Between the performance of these distinct duties, the master intervened and undertook the discharge of his primary duty to render reasonably safe the working place for the timbermen who followed in the wake of the miners, and the rights of this plaintiff as a timberman are not to be prejudiced by the fact that as a miner he was a factor which possibly and probably caused to be loosened the very rock which fell upon him. It would be a

monstrous doctrine which would hold him responsible for the safety of his working place in setting the timbers, when the master not only undertook to discharge the safe-place duty, but prevented the plaintiff from performing it for himself.

We think the plaintiff made out a *prima facie* case of actionable negligence.

It was a question for the jury to determine whether under all the circumstances the foreman exercised reasonable care to provide for the plaintiff, as a timberman, a reasonably safe place for his work.

The order is reversed and the cause is remanded for a new trial.

Reversed and remanded.

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, did not hear the argument, and takes no part in the foregoing decision.

AETNA ACCIDENT & LIABILITY CO., APPELLANT, v.
MILLER, RECEIVER, RESPONDENT.

(No. 4,094.)

(Submitted January 7, 1918. Decided January 24, 1918.)

[170 Pac. 760.]

*States—Insolvent Banks—Preferences—Sovereign Prerogatives
—Sureties—Subrogation—Common Law—Waiver.*

States—Insolvent Banks—Deposits—Suretyship—Subrogation.

1. Where deposits of state funds are secured by a bond and the surety is compelled to pay the amount thereof upon failure of the bank, the right of the state, if existent and not lost in some way, passes by subrogation to the surety.

Same—Preferences—Common Law.

2. *Held*, under the common law, in the absence of statutory or constitutional provision on the subject, that the state is entitled to a preference, as a prerogative right, over the unsecured creditors of an insolvent bank in which it has funds on deposit.

Common Law—What Constitutes.

3. "Common law" means the common law of England as applied and modified by the courts of this country up to the time it became the rule of decision in this state.

[As to what the "common law" includes, see note in Ann. Cas. 1913E, 1222. As to extent of adoption of common law, see note in Ann. Cas. 1913E, 1232.]

States—Prerogative Rights—Waiver.

4. No right of the state can be waived by any power short of that of the state; therefore the prerogative right of the state to a preference was not defeated by an assignment of its claim to the surety, through the instrumentality of a ministerial officer.

Same—Statutes—Diminishing Powers—Construction.

5. The state is not bound by the general language of a statute which tends to restrain or diminish its powers, rights or interests.

Same—Preferences—Right Effective When.

6. The right of preference is effective only while the debtor retains title to the property out of which payment is sought to be made.

Same—Banks—Receivership—Preferences.

7. A receivership does not divest the title of the owner; hence the appointment of a receiver of a bank did not result in such a divestiture of title as to destroy the state's right of preference as against general creditors.

Appeal from District Court, Carbon County; A. C. Spencer, Judge.

ACTION by the Aetna Accident & Liability Company against H. B. Miller, as receiver of the Farmers' State Bank of Bridger, Montana. Judgment for the receiver and plaintiff appeals. Reversed and remanded.

Messrs. Frank & Gaines, for Appellant, submitted a brief; *Mr. R. F. Gaines* argued the cause orally.

Practically a parallel set of facts and constitutional and Code provisions to the case at bar are to be found in the cases of *In re Carnegie Trust Co.*, 151 App. Div. 606, 136 N. Y. Supp. 466, affirmed, 206 N. Y. 390, 46 L. R. A. (n. s.) 260, 99 N. E. 1096, and *United States, F. & G. Co. v. Carnegie Trust Co.*, 151 App. Div. 435, 146 N. Y. Supp. 804, affirmed, 213 N. Y. 629, 107 N. E. 1087. These cases sustain appellant's contention at all points, and, we submit, demand a reversal of the judgment. Other decisions to the same general effect, and in addition to those heretofore cited, are: *Orem v. Wrightson*, 51 Md. 34, 34 Am. Rep.

286; *Booth v. State*, 131 Ga. 750, 63 S. E. 502; *Central Bank & Trust Corp. v. State*, 139 Ga. 54, 76 S. E. 587; *United States & G. Co. v. Rainey*, 120 Tenn. 357, 113 S. W. 397; *American Bonding Co. v. Reynolds*, 203 Fed. 356, 358; 26 Am. & Eng. Ency. of Law, 479. The general doctrine that a surety may assert against his principal, upon his payment of the latter's debt, any right or remedy that the creditor has, is well settled. (37 Cyc. 363-367, 380; 27 Am. & Eng. Ency. of Law, 202-210; 4 Pomeroy's Equity Jurisprudence, sec. 1419; see, also, note to *American Bond Co. v. National Mechanics' Bank*, 99 Am. St. Rep. 476, 506, 507.)

The right of a surety of a debtor of a state to assert the preferential right of the state is declared in the following cases: *United States F. & G. Co. v. Carnegie Trust Co.*, 151 App. Div. 435, 146 N. Y. Supp. 804, and cases; *Cheesbrough v. Millard*, 1 Johns. Ch. (N. Y.) 409, 7 Am. Dec. 494; *Orem v. Wrightson*, *supra*; see, also, note to *American Bond Co. v. National Mechanics' Bank*, 99 Am. St. Rep. 488, 497, 509. These last-mentioned authorities also make clear the principle that the right to stand in the creditor's shoes and assert his privileges depends, not on the action of the creditor, but upon the payment of the principal's debt; and these cases also demonstrate that the failure of the state treasurer of the state of Montana to claim as a preferred creditor, does not affect the right of appellant to assert such a claim.

The Constitution and Codes of this state do not aid in the determination of this appeal. A constitutional provision, very similar to section 39 of Article V of our Constitution, was held in *State v. Foster*, 5 Wyo. 199, 63 Am. St. Rep. 47, 29 L. R. A. 226, 38 Pac. 926, not to be an assertion of the state's rights to a preference in payment. Whether the reasoning of that case on this point can be adopted by this court in view of different fact conditions and because of the fact that the dissolution of a corporation upon its assets being exhausted in *pro rata* payments among creditors, in effect extinguishes the obligation, does not prejudice appellant's position, for there was no suggestion

advanced that the provision operated as a waiver of the right. Nor do we believe that the provisions of section 13 of Article XII of the Constitution or of section 183, Revised Codes, militate against appellant's contention. Certainly the language used evidences no clear and unequivocal intention to waive any rights belonging to the state; and a contrary conclusion, in the face of similar provisions, has been reached by the courts of Georgia and New York. (*Booth v. State*, 131 Ga. 750, 63 S. E. 502; *In re Carnegie*, 151 App. Div. 606, 136 N. Y. Supp. 466.)

Messrs. Nichols & Wilson, for Respondent, submitted a brief.

Our contention here is that the Michigan, South Carolina and Mississippi courts have correctly announced the law which is controlling in this case; that there being no constitutional or statutory provisions in Montana conferring upon the state any preference right of payment out of the funds of an insolvent, the state could not have established a preferred claim against the respondent receiver. Obviously if the state could not establish such claim, its assignee, the appellant herein, cannot. (*Commissioner of Banking v. Chelsea Savings Bank*, 161 Mich. 691, 125 N. W. 424; *State v. Harris*, 2 Bail. (S. C.) 598; *Klinck v. Keckley*, 2 Hill Eq. (S. C.) 250, 256; *Potter v. Fidelity & Deposit Co.*, 101 Miss. 823, 58 South. 713.)

Assuming, however, that the sovereign right of preference was adopted as a part of the law of Montana by the enactment of sections 3552 and 8060, Revised Codes, and assuming, further, that it has not been abrogated by the provisions of the Codes, still the contention of appellant herein must fail because of the fact that it was not sought to assert the right in this case until after the debtor's title to the property had been divested and the property had passed beyond its control. As an exception to the common-law rule, the authorities uniformly hold that the sovereign right of preference must be exercised while the insolvent retains title to the property against which the preference is claimed, and while he still possesses control thereof. (*Board of Chosen Freeholders v. State Bank*, 29 N. J. Eq. 268 (affirmed

in 30 N. J. Eq. 311); *State v. Foster*, 5 Wyo. 199, 63 Am. St. Rep. 47, 29 L. R. A. 226, 38 Pac. 926; *State v. Williams*, 101 Md. 529, 109 Am. St. Rep. 579, 4 Ann. Cas. 970, 1 L. R. A. (n. s.) 254, 61 Atl. 297; *Hoke v. Henderson*, 14 N. C. (3 Dev. L. 12) 17; *Commissioner of Banking v. Chelsea Savings Bank*, *supra*.) The title of the Farmers' State Bank of Bridger to all of its property and assets, real and personal, was divested by the appointment of the respondent receiver. (*Brynjolfson v. Osthus*, 12 N. D. 42, 96 N. W. 261; *American Nat. Bank v. National Benefit & Casualty Co.*, 70 Fed. 420; *Cobb v. Camden Savings Bank*, 106 Me. 178, 20 Ann. Cas. 547, 76 Atl. 667, 670; *Tillinghast v. Champlin*, 4 R. I. 173, 67 Am. Dec. 510; *Ryan v. Kingsbery*, 88 Ga. 361, 14 S. E. 596, 606.) From the inception of the receiver's possession, the property of the bank was immune from attachment or seizure by any creditor of the bank, and no creditor could in any wise interfere with the receiver's possession, control or disposition thereof. (*Gardner v. Caldwell*, 16 Mont. 221, 40 Pac. 590; *In re Tyler*, 149 U. S. 164, 37 L. Ed. 689, 13 Sup. Ct. Rep. 785.)

MR. JUSTICE SANNER delivered the opinion of the court.

On May 8, 1915, the affairs of the Farmers' State Bank of Bridger were in such condition that the district court of Carbon county, upon the complaint of the attorney general filed pursuant to sections 59 and 60 of Chapter 89, Laws of 1915, appointed the respondent H. B. Miller as its receiver. There was at the time on deposit with the bank, subject to check, \$10,000 of state funds "theretofore raised by levies of taxes, assessments and collections" secured by a bond in said amount, upon which bond the appellant, Aetna Accident & Liability Company, stood as surety. Thereafter the surety, by and because of the conditions of such bond, was compelled to and did pay to the state the amount of the penalty of the bond, to-wit, \$10,000. In consequence of these circumstances, as well as of an assignment to it of the state's claim, the surety brought this action seeking an adjudication that it is entitled to the payment of said sum in

preference to the claims of general creditors, and an order directing the receiver to make such payment; he having in his hands funds sufficient for that purpose. Judgment for the receiver followed an order sustaining his general demurrer to the complaint, and this appeal is from that judgment.

The fundamental question presented is: Did the state have the [1] preference right asserted? If it did, there does not seem much room for doubt that, unless in some way lost, such right passed by subrogation to the appellant. (Rev. Codes, secs. 5691, 5692; *American Bond Co. v. National Mechanics' Bank*, 99 Am. St. Rep. 488, note; *United States F. & G. Co. v. Carnegie Trust Co.*, 161 App. Div. 435, 146 N. Y. Supp. 804, affirmed 213 N. Y. 629, 107 N. E. 1087.)

Whether the state was entitled to a preference over all the [2, 3] unsecured general creditors of the insolvent bank cannot be determined by resort to any express statute or constitutional provision, for confessedly none such exist; hence the question is one to be resolved according to the common law. (Rev. Codes, secs. 3552, 8060.) Just what is meant by the "common law" in this connection, however, is a matter open to definition. Broadly speaking, it means, of course, the common law of England; but it means that body of jurisprudence as applied and modified by the courts of this country up to the time it became a rule of decision in this commonwealth. (*State ex rel. Metcalf v. District Court*, 52 Mont. 46, 50, Ann. Cas. 1918A, 985, L. R. A. 1916F, 132, 155 Pac. 278.) The distinction is noted here because the common law as administered in England without a doubt commands the recognition of the sovereign as entitled to the preference (1 Coke upon Littleton, 131B; 8 Bacon's Abridgment, 91); whereas the respondent insists that the common law as recognized and applied in the United States is otherwise.

At the time the territory of Montana was organized and first formally adopted the common law as our rule of decision in the absence of statute (Bannack Stats., p. 356), there existed a vast number of decided cases from almost all of the states holding that divers and sundry prerogatives ascribed to the king at

common law had passed to the states—those only being denied which had attached to the king in his personal character rather than as *parens patriae* or personification of the sovereignty. Among these cases, which are illuminative collaterally, were thirteen directly bearing upon the question here involved, to-wit: Seven from Maryland (*State v. Bank of Maryland*, 6 Gill & J. 205, 26 Am. Dec. 561; *State v. Mayor etc. of Baltimore*, 10 Md. 504; *Jones v. Jones*, 1 Bland, 443, 18 Am. Dec. 327; *Smith v. State*, 5 Gill, 45; *Contee v. Chew's Exr.*, 1 Har. & J. 417; *State v. Rogers*, 2 Har. & McH. 198; *Murray v. Ridley*, 3 Har. & McH. 171), one from Georgia (*Robinson v. Bank of Darien*, 18 Ga. 65), one from North Carolina (*Hoke v. Henderson*, 14 N. C. 12, 20, 24), two from South Carolina (*State v. Harris*, 2 Bail. 598; *Klinck v. Keckley*, 2 Hill Eq. 250, 256), and one from the supreme court of the United States (*United States v. Bank of North Carolina*, 6 Pet. 29, 8 L. Ed. 308). Of these, only the two opinions from South Carolina deny the right to preference as a surviving prerogative,—and they do this without serious attempt to soberly reason the matter. There was an earlier decision in that state referred to in the *Klinck Case* (*Commissioners, etc., v. Greenwood*, 1 Desaus. (S. C.) 450), which seems to hold that the right, if it exists, cannot prevail over mortgages, judgments and other liens—a proposition which, so far as we know, no American court has ever disputed.

When our state Constitution was adopted and the Compiled Statutes of 1887 (including section 201, Div. 5) were continued in force, the decided cases bearing upon the particular claim here asserted had been increased by eight (*Central Trust Co. v. New York etc. R. Co.*, 110 N. Y. 250, 259, 1 L. R. A. 260, 18 N. E. 92; *In re Receivership Columbian Marine Ins. Co.*, 42 N. Y. (3 Keyes) 123, 3 Abb. Dec. (N. Y.) 239; *State v. Baltimore & O. Ry.*, 34 Md. 344, 374; *Orem v. Wrightson*, 51 Md. 34, 34 Am. Rep. 286; *State v. Dickson*, 38 Ga. 171; *Seay v. Bank of Rome*, 66 Ga. 609; *State v. Rowse*, 49 Mo. 586, 592; *Board of Chosen Freeholders, etc., v. State Bank*, 29 N. J. Eq. 268, affirmed 30 N. J. Eq. 311), of which one, the New Jersey case, denied

the right "as an actual prerogative of government," chiefly because it had not been exerted or recognized in that state for over a hundred years and "a prerogative which has remained so long practically useless can hardly be said to exist."

Since the adoption of our state Constitution and up to the present time, a considerable addition has been made to the decisions, notably: *Booth v. State*, 131 Ga. 750, 63 S. E. 502; *In re Carnegie Trust Co.*, 151 App. Div. 606, 136 N. Y. Supp. 466, affirmed 206 N. Y. 390, 46 L. R. A. (n. s.) 260, 99 N. E. 1096; *United States F. & G. Co. v. Carnegie Trust Co.*, 161 App. Div. 435, 146 N. Y. Supp. 804, affirmed 213 N. Y. 629, 107 N. E. 1087; *Central Bank & Trust Corp. v. State*, 139 Ga. 54, 76 S. E. 587; *United States F. & G. Co. v. Rainey*, 120 Tenn. 357, 113 S. W. 397; *American Bonding Co. v. Reynolds* (D. C.), 203 Fed. 356, reversed, *Brown v. American Bonding Co.*, 210 Fed. 844, 127 C. C. A. 406; *State v. Foster*, 5 Wyo. 199, 63 Am. St. Rep. 47, 29 L. R. A. 226, 38 Pac. 926; *State v. First State Bank* (N. M.), 167 Pac. 3; *Central Trust Co. v. Third Ave. Ry. Co.*, 186 Fed. 292, 110 C. C. A. 1; *Potter v. Fidelity Deposit Co.*, 101 Miss. 823, 58 South. 713; *Commissioner v. Bank*, 161 Mich. 691, 704, 125 N. W. 424, 127 N. W. 351. The last five are usually cited as opposed to the right here claimed, while the others vigorously uphold it; but the five referred to are not entitled to be classed as authoritative voices in opposition. The Wyoming and New Mexico cases, for instance, actually recognize the right, but deny its application to the particular instance; the federal opinion is squarely in the teeth of a prior declaration to the contrary by the circuit court of appeals of New York, viz., *In re Carnegie Trust Co.*, 206 N. Y. 390, 46 L. R. A. (n. s.) 260, 99 N. E. 1096; the Michigan decision consists of two utterances, one discussing the preference as a prerogative right, but saying, "The question is not presented," the other seeming to hold that explicit legislation is necessary to put the right into effect; the Mississippi case is squarely against the right, but assigns no reason except *Shields v. Thomas*, 71 Miss. 260, 42 Am. St. Rep. 458, 14 South. 84,

which, so far as we can see, has not the remotest bearing upon the question.

Special notice must, however, be taken of *American Bonding Co. v. Reynolds, supra*, and *Brown v. American Bonding Co., supra*, because the case, which had its issue in these opinions, arose in this state and represents an effort to settle the law of this state upon the identical questions now before us. Ordinarily, these utterances would be entitled to very respectful consideration, although in a matter of this sort the voice of the state tribunals is supreme. But the case presents a singular situation. The district court held that the state of Montana has a preference over general creditors to payment from an insolvent debtor; that the right is not discretionary in the officers of the state, but is of a prerogative character; and that it may pass by subrogation to the debtor's surety compelled to make such payment. This was reversed and its standing as authority destroyed on appeal; yet the opinion on appeal is not persuasive for these reasons: It assumes the domestic law of New York to be as stated by the second circuit court of appeals (*Central Trust Co. v. Third Ave. Ry. Co., supra*) against the claim to such prerogative right, notwithstanding the declaration of the highest court of that state in favor of the claim (*In re Carnegie Trust Co., supra*); it suggests that since the United States asserts its preference under specific statute, and not upon prerogative, this state may not possess any prerogative preference because "no state can have any greater sovereign right than the general government of the entire country," notwithstanding that the federal Constitution is a grant of power and, under Amendment X, states can and do have sovereign rights which the general government does not possess; it raises the question whether, if the prerogative right exists, such right can pass to a private party by subrogation, without actually deciding whether such right does exist or can so pass; and it determines the appeal upon a proposition which we cannot accept, *viz.*: that the prerogative right, [3] if it exists and can so pass, may be defeated because a ministerial officer of the state has failed to cast its claim in proper

form and has assigned that claim to the surety. If anything may be taken as a truism, it is that no right of the sovereign can be waived by any power short of the sovereign; so that, whatever claim on behalf of the state was filed with the receiver, the measure of its demand was not the form of the claim but the right behind the claim, and if that right passed by subrogation, no written assignment of any kind could aid it or destroy it.

So much for the decisions, considered numerically. By states and by substance the disparity between the two classes is very marked. Those opposed to the preference seem so overwhelmed by the term "prerogative" that they lose sight of the reality for which it stands and which is inseparable from sovereignty in any form. The prevailing view, and the view that has always held the weight of authority, is emphatically in favor of the preference, and the philosophy of it is sententiously expressed by the supreme court of the United States thus: "The right to priority of payment of debts due to the government is a prerogative of the crown well known to the common law. It is founded, not so much upon any personal advantage to the sovereign, as upon motives of public policy, in order to secure an adequate revenue to sustain the public burdens, and discharge the public debts." (*United States v. Bank of North Carolina, supra.*) Likewise, the New York court of appeals: "Under our Constitution we have no king. The king therefore, and the prerogatives that were personal to him being repugnant to our Constitution, are abrogated; but his sovereignty, powers, functions, and duties, in so far as they pertain to civil government, now devolve upon the people of the state, and consequently are not in conflict with any of the provisions of our Constitution. Inasmuch, therefore, as the claims or moneys due the king for the support and maintenance of the government, whether derived from taxes or other sources of income, were preferred over the claims of others, it follows that under the first subdivision of the * * * Constitution of 1777, quoted, such preference became a part of the common law of our state, and is so continued under our present Constitution." (*In re Carnegie Trust Co.,*

supra.) Finally, the court of appeals of Maryland: "Notwithstanding all that has been said in disparagement of this right of priority, it is not perceived to be inconsistent with the principles or spirit of our political institutions. * * * It * * * is a rule only in the distribution of the property of the debtor, requiring the debt due to the state to be first paid, where the individual debtor has no antecedent lien overreaching it. The government of the state is established for the good of the whole, and can only be supported by means of its revenue; which revenue the good of the whole requires to be protected. And as it can only act by its agents, who, no matter how vigilant, cannot always be present to protect its rights, a priority in the payment of its debts (which must always be of a public nature) is necessary to enable it to accomplish the ends of its institution. It is not therefore opposed to a sense of right that the interests of all should prevail over that of an individual, when it can be asserted without disturbing vested rights, which diligent creditors can more readily acquire than the government through its agents." (*State v. Bank of Maryland, supra.*)

Some contention is made that the provisions of Code sections 6123, 6124, 6125, and 6140, by defining "creditors" and authorizing preferences, operate as an abrogation of any special right in the state under the common law. We do not appreciate the force of this. Sections 6123 and 6124 are not even suggestive. Section 6125 provides that a debtor may pay or secure one creditor in preference to another; if this has any relation to cases of insolvency, it is limited by the rule stated in section 6142, that no voluntary preference can affect or impair the right of a creditor whose claim stands preferred by contract or by operation of law. Section 6140 does deal with insolvency proceedings, and into such it injects an automatic preference in favor of wage claims to an amount not exceeding \$200 each; but this at most could amount to nothing more than an assent by the state to share its preference in such cases with such claims. Whether it goes so far is doubtful in the absence of an express declaration to that effect, since the rule—accepted universally we believe—

[4] is that the sovereign authority is not bound by the general language of a statute which tends to restrain or diminish the powers, rights or interests of the sovereign. (*United States v. Herron*, 20 Wall. (U. S.) 251, 22 L. Ed. 275; *Guaranty Title & Trust Co. v. Title Guaranty & S. Co.*, 224 U. S. 152, 155, 56 L. Ed. 706, 32 Sup. Ct. Rep. 457.)

It is insisted, however, that under no theory of the sovereign [5, 6] prerogative accepted in this country can the state's preference prevail "because it was not sought to assert the right in this case until after the debtor's title to the property had been divested and the property passed beyond its control." Undoubtedly the sovereign right of preference is effective only while the debtor retains title to the property out of which payment is sought to be made; but is it correct to say that there was such a divestiture here as to forestall the preference? Counsel cite, as supporting the affirmative, certain cases involving assignments for the benefit of creditors. These, however, are unavailing, because, as we have seen, no such assignment can be effective in this jurisdiction to prevent a preference created by operation of law. Equally valueless are the holdings cited to the effect that a receivership divests the title of the owner; for, whatever may be the law elsewhere, the rule is different in this state. (*Gardner v. Caldwell*, 16 Mont. 221, 224, 40 Pac. 590; *Lyon v. United States Fidelity & Guaranty Co.*, 48 Mont. 591, 600, Ann. Cas. 1915D, 1036, 140 Pac. 86.) But, it is said, by the receivership the bank lost all control over its assets, and this is sufficient to defeat the preference. It is certainly true that during receivership the owner loses the control of his property, and in receiverships like this such control may never be regained. Yet to regain control is always theoretically possible, for the purpose of any receivership is to husband the property thereby sequestered for whoever may be entitled to it. Nor is it decisive that the receiver may sell, under order of court, because that power is given and may be used only in furtherance of the purpose to husband; so, too, an executor or administrator may sell, yet it cannot be contended that he has title or such control over

the real estate of his decedent as would defeat a lawful preference. A receivership and an assignment for the benefit of creditors are two different things (*Babcock v. Maxwell*, 21 Mont. 507, 513, 54 Pac. 943), but this court has said that the position of a receiver is no better and no higher than that of an assignee; he occupies a situation not materially different from that of the insolvent prior to the appointment; he is the arm of the court to accomplish, when necessary, the distribution of the assets of the insolvent according to the rights of those entitled thereto. (*Williams v. Johnson*, 50 Mont. 7, Ann. Cas. 1916D, 595, 144 Pac. 768.) This of necessity involves a recognition of the order in which such rights shall come. The present receivership was procured by the state, under its own banking laws, for the protection of itself and other creditors; it would be a strange result if such a proceeding so brought must operate to impair the right thus sought to be conserved.

We see no rational escape from the view that the order sustaining the demurrer to the complaint was a mistake. The judgment founded thereon is therefore reversed, and the cause remanded for further appropriate proceedings.

Reversed and remanded.

MR. JUSTICE HOLLOWAY concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, did not hear the argument and takes no part in the foregoing decision.

STATE EX REL. CRYDERMAN, RELATOR, v. WIENRICH
ET AL., RESPONDENTS.

(No. 4,175.)

(Submitted January 28, 1918. Decided February 1, 1918.)

[170 Pac. 942.]

Agriculture—Counties—Indebtedness—Seed Grain Law—Constitution—Taxation—Public Purpose—Loaning Credit.

Statutes—Constitutionality—Duty of Courts.

1. Where a statute is assailed as unconstitutional, the question is not whether it is possible to condemn but whether it is possible to uphold; hence it will not be declared unconstitutional unless its nullity is placed beyond reasonable doubt.

[As to caution observed by courts in respect to declaring statutes void, see note in 48 Am. Dec. 269.]

Agriculture—Counties—Seed Grain Law—Taxation—Public Purpose.

2. *Held*, that the seed grain law (Chap. 13, Laws 1915), designed to furnish aid to persons engaged in agriculture who, because so reduced in circumstances by natural or other conditions beyond their control, that they have no means wherewith to purchase seed, is not in contravention of section 11, Article XII, forbidding taxation, for other than public purposes.

Same—Provisions of Act—For Whose Benefit.

3. The benefits of the seed grain law above, *held* to be intended as much for farmers who do not own land, i. e., homesteaders and renters, as for those who do.

Same—Destitute Farmers—Counties—Loaning Credit—Constitution.

4. Construing section 1, Article XIII, Constitution, forbidding counties from giving or loaning their credit in aid of, or making any donation to, an individual, with section 5, Article X, making it the duty of the counties to provide for those inhabitants who by reason of misfortune may have claims upon the aid of society, the seed grain law does not offend against section 1, *supra*.

Same—Constitution—Appropriation—Public Funds.

5. Section 35, Article V, prohibiting appropriations by the legislature for benevolent purposes, does not affect Chapter 13, *supra*, since the legislature made no appropriation for the purposes sought to be served by the Act.

Same—Counties—Incurring Indebtedness—Special Election.

6. Chapter 13, Laws of 1915, *held* inoperative in any case in which the indebtedness sought to be created by a county bond issue is in excess of \$10,000, upon a mere petition, section 5, Article XIII, of the Constitution prohibiting the incurring of indebtedness beyond the sum of \$10,000 without the approval of the qualified electors, and no provision for such an election having been made.

The question of constitutionality of statute providing for farm loans is discussed in a note in L. R. A. 1917A, 495.

Original application for writ of injunction by the state, on the relation of M. Cryderman, against F. A. Wienrich and others, as the Board of County Commissioners of Sheridan County. Writ issued.

Messrs. Babcock & Ellery, for Relator, submitted a brief; *Mr. C. R. Ellery* argued the cause orally.

Mr. S. C. Ford, Attorney General, submitted a brief and argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Suit to enjoin the board of county commissioners of Sheridan county from holding a special election under the provisions of the Act approved February 16, 1915, known as the seed grain law (Chap. 13, Laws 1915).

The complaint shows that in consequence of a partial failure of crops in 1916, the long, hard winter of 1916-17, and the general failure of crops in 1917, due to the cold, late spring and the drought and hot winds of the summer of that year, there is now in Sheridan county a large number of farmers who are without seed grain for the coming season or financial resources with which to procure any, and who are destitute and will become dependent upon the county for support, unless such seed grain can be obtained; that with knowledge and in consequence of these facts, the board of county commissioners, after petition duly signed, presented and considered, as required by said Act, has called a special election of the electors of said county for the submission of the question whether said county shall issue and sell its warrants drawn on the general fund to an amount aggregating \$300,000 for the purpose of providing means with which to purchase seed grain for the inhabitants of said county "who are resident freeholders" in need of seed grain and unable to procure the same; that the notice of said election is being published and such election will be held, unless restrained, at a large cost to the taxpayers of said county, including the plain-

tiff who is one of them; that the holding of said election should be enjoined because the Act of the legislature under which the same is called, and the only authority therefor, is void as in contravention of certain sections of the state Constitution.

The defendants appear by general demurrer, contesting the sufficiency of the complaint, and thus join issue upon the question sought to be raised, *viz.*, the validity, under the Constitution, of the seed grain law; but the demurrer is more far-reaching, for it also presents the question whether the defendants are proceeding in conformity with that law, should its validity be established.

The Act is entitled, "An Act authorizing counties to issue bonds or warrants to procure seed grain for needy farmers resident therein, * * * providing for the distribution of said seed grain among the needy farmers," *etc.*; its provisions, pertinent to the present inquiry, are: Section 1: In any county where the crops for the preceding year have been a total or partial failure by reason of drought or other cause, it shall be lawful for the board of county commissioners to issue bonds of the county, and with the proceeds derived from the sale thereof, to purchase seed wheat for the inhabitants of the county who are in need of seed grain and are unable to procure the same, whenever said board shall be petitioned in writing to do so, by not less than 100 freeholders resident in the county; provided that all such petitions shall be filed on or before April 1. Section 6: The board of county commissioners may issue warrants instead of bonds, if in their judgment the best interests of the county are thereby served; provided, that such warrants shall not be issued in any single amount to exceed \$3,000. Section 7: The fund arising from the sale of said bonds or warrants shall be applied exclusively by the said board for the purchase of seed grain for residents of the county who are unable to procure the same; not more than 100 bushels of wheat or its equivalent in other grains to be furnished to any one person. Section 9: All persons entitled to and wishing the benefit of this Act, shall on or before April 1 file an application, sworn to, which shall

contain a true statement of the number of acres the applicant has plowed or prepared for seeding or intends to have plowed or prepared for seeding; how many bushels and what kind of grain he will require to seed the ground so prepared; how many bushels of grain he harvested in the preceding year; that he has not procured and is not able to procure the necessary seed grain for the current year; and said application shall contain a true and full description of all the real and personal property owned by the applicant, and the encumbrances thereon, and a true description by government subdivisions of the land upon which the applicant intends to sow said seed grain. Section 10: The board of county commissioners is appointed and constituted a board of examination and adjustment of the applications for seed grain, and must on the first Tuesday in March, or as soon thereafter as possible, examine and consider separately each application filed, and must determine who are entitled to the benefits of the Act, and the amount to which each applicant is entitled; and said board shall, on or before the tenth day of April, file its adjustment of said applications. Section 11: The county auditor, as soon as the board has acted according to section 10, shall issue to each applicant an order for the number of bushels of each kind of seed grain which has been allowed to such applicant; provided, the applicant first sign a contract promising to repay the cost of such grain, that the sum thereof shall be taxable against all real and personal property of the applicant, shall be due and payable on the first day of October in the year in which the grain is furnished, with interest from April 1 at six per cent, and if not paid on or before October 20, shall be extended as a tax on the land on which the grain is sown, or upon any other land owned by the applicant, and be collected as other taxes, and shall be a lien upon the real estate owned by said person until fully paid. Section 12: On the filing of the contracts provided for in section 11, the county shall acquire first preference liens upon the crops of grain raised each year by the person receiving seed grain to the amount of the sum due. Section 13: The person receiving such grain shall,

as soon as his crops for the year are harvested and threshed, market sufficient to pay the amount then due. Section 14: Upon the sowing of the seed obtained under the Act, the title and right of possession to the growing crop and to the grain produced shall, until the seed is paid for, be in the county which furnished it, as against any seizure or interference by anyone other than the applicant or his employees for the purpose of harvesting, threshing and marketing. Section 16: The commissioners of any county proposing to issue seed grain shall advertise such intention in such manner and for such time, prior to April 1, as may be possible, giving notice that all applications must be filed by April 1, but no distribution of grain shall take place before April 5; the commissioners shall have the right to refuse any application which they deem improper to grant, and they may revise their adjustment of applications at any time before distribution.

1. With this, as with all other Acts of the legislative assembly [1] assailed as unconstitutional, the question is not whether it is possible to condemn, but whether it is possible to uphold; and we still stand committed to the rule that a statute will not be declared unconstitutional unless its nullity is placed, in our judgment, beyond reasonable doubt. (*State ex rel. Hay v. Alderson*, 49 Mont. 387, 403, Ann. Cas. 1916B, 39, 142 Pac. 210.) Now, the outstanding purpose of the Act in question, as may be gathered from the abstract above set forth, is to furnish aid, in the shape of seed grain, to needy farmers who cannot themselves procure the same, and it is insisted that this may not be done, because (a) it is not a public purpose; (b) "neither the state, nor any county, city, town, municipality, nor other subdivision of the state shall ever give or loan its credit in aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation" (Const., Art. XIII, sec. 1); and (c) "no appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state" (Const. Art. V, sec. 35).

(a) Public authorities may not do by indirection what they cannot do directly; and forasmuch as the bonds or warrants [2] authorized by this Act to be issued and sold must, to the extent that repayment fails or is delayed, be made good by taxation, it is entirely clear that their issuance cannot be authorized save for a purpose for which taxation is lawful. Hence the rule that taxes may not be laid except for a public purpose is properly invoked. May this be considered such a purpose? That depends on what is meant by "needy farmers who are unable to procure seed"; for, vast and important as farming operations are, and worthy as they may be of such public encouragement as many of our statutes do authorize, still, as such, they are private and not public. But section 5 of Article X of the Constitution commands that: "The several counties of the state shall provide, as may be prescribed by law, for those inhabitants, who, by reason of age, infirmity or other misfortune, may have claims upon the sympathy and aid of society"—and there cannot be a doubt that under this section a family burned out of house and home, or by an epidemic isolated there, without money, credit or other means of support, would be persons for whom a county should provide. Is the duty to provide in such a case any the less imperative, and is the purpose to make such provision any the less public if, instead of one family, the disaster should involve a hundred or a thousand? And would it alter the case that all the unfortunates happened to belong to a particular class or to pursue a particular vocation? Now, to the farmer, unfavorably situated, drought, hail or other causes of crop failure may entail results equally ruinous and not different in character from those of pestilence or fire; they may drive him to the verge of the poorhouse, and he becomes, as the victim of misfortune, a person with claims upon the sympathy and aid of society—the more so as he is unwilling to become wholly dependent—for which the county may and must provide. If, therefore, the phrase "needy farmers who are unable to procure seed" may be taken to mean persons engaged in agriculture who, by natural or other conditions beyond their control, are so reduced

in circumstances that they have neither money, nor credit, nor property in shape to be pledged or mortgaged, and who without some aid will become paupers, dependent on the county for support—and we think this is the meaning—then the purpose to aid them is a public one, and the only subject left to consider is the validity of the means prescribed.

We realize that in *State ex rel. Griffith v. Osawkee Twp.*, 14 Kan. 418, 19 Am. Rep. 99, the court, in a precisely similar case and under a precisely similar constitutional provision, has taken other ground—holding, in effect, that one is not a proper subject of relief until he is actually a pauper, not only helpless, but hopeless. This case was decided in 1875, and the opinion, though written by one of the foremost jurists of that era, shows how even mighty minds are circumscribed by the spirit of their time. The argument is considered in the only two other seed grain cases in the books, and is fully answered in one (*State v. Nelson County*, 1 N. D. 88, 26 Am. St. Rep. 609, 8 L. R. A. 283, 45 N. W. 33), and discounted in the other (*Deering & Co. v. Peterson*, 75 Minn. 118, 77 N. W. 568); it no longer responds to the spirit, nor meets the needs, of an age which has learned that “an ounce of prevention is worth a pound of cure,” and that it is sounder benevolence to help the needy to support themselves, to retain or regain their self-respect, than it is to wholly and forever keep them in the public charge and at the public expense.

We also realize that some phrases of the Act would seem to [3] indicate a limitation of its benefits to those farmers who own real estate and thus, by excluding the class—homesteaders and renters—most likely to need these benefits, to militate against the view that the statute can be taken as a measure of poor relief. But we are to consider the statute as a whole and to give it such construction as will validate it, if that may be done without violence to its language. So, assuming its general purpose to be as stated, these phrases—which relate to a listing of the property owned, with encumbrances, and provide for a lien upon both land and crops—are to be taken as applicable only so far as may be. The benefits of the Act cannot be denied to any

“needy farmer who is unable to procure seed,” whether he owns land or only rents it, or occupies it without patent under the laws of the United States; but if he does own any property, it must be so encumbered that he cannot raise enough to buy seed and keep himself while the crop is maturing, and whatever he owns of real estate is, together with the crop, subject to a lien for the seed furnished. These details, so far from warring with the Act as a measure of poor relief, are, in our opinion, both just to the public and honorable to the recipient.

(b) Keeping in mind, then, that the Act is to be considered, [4] and can be vindicated only as, a measure of relief to those “who by reason of misfortune have claims upon the aid of society,” we come to the means to be employed. Are they a violation of section 1, Article XIII, of the Constitution? Under any and every measure of poor relief known to the law and practice of this state, there is always a donation at least to some individual; this is as obnoxious to the section just referred to as a loan of credit or a grant; and it matters not that the donation is or may be food, fuel or shelter, which cost money, instead of money itself. How may these be justified? Clearly by construing—as every rule of interpretation requires that we shall—section 1, Article XIII, with section 5, Article X, since these two are pertinent to the subject in hand; and, when this is done, we find the inhibition of the former modified by the command of the latter. The result is that no county may give or loan its credit in aid of, or make any donation or grant to, any individual save, in some manner prescribed by law, as a measure of prior relief; so that, if any course proposed is a measure of poor relief and is prescribed by law, there is no contravention of section 1, Article XIII, even though it should involve a loan or a donation. As a matter of fact, the origin and purpose of the restrictions in section 1, Article XIII, are well known. They arose in a time when the evils of public aid to railroads were notorious; they were intended to prevent the extension of such aid to either individuals or corporations for the purpose of fostering business enterprises, whether of a semi-public or private

nature; they had and were designed to have no reference whatever to suitable measures, elsewhere commanded, for the relief of the poor.

It may be argued, however—as in the Kansas case it was held—that the furnishing of seed grain to needy farmers is an aid to them in their private business, and thus within the restrictions above noted. The same may be said of any measure of poor relief which is not absolutely confined to paupers in the poorhouse; whether it may be properly so said in any case depends upon the primary object in view. If that object is to foster private enterprises and the only benefit to be derived by the public is incidental and secondary, then the restrictions apply, and the credit or donation may not be granted; but if the primary object is to prevent a class of needy citizens from becoming a permanent public charge, the fact that their own efforts and self-respect are called in to aid the design cannot make it the less a public one. The application upon an extended scale of such laws as this can only come in seasons of true calamity, when the question presented is whether a most important element of the population shall starve, be idly supported by the public without any prospect of alleviation, or be helped to sustain themselves. That the solution of such a question is primarily of public concern is perfectly plain, and deference is due to any enactment of the legislature in the rational effort to solve it.

(c) Section 35 of Article V has no relevancy here; it is [5] addressed to the legislature, and no appropriation by the legislature for any purpose is involved.

2. There is, however, a constitutional objection to this Act [6] which very seriously curtails its scope. Carelessly copied from the statutes of North Dakota, whose Constitution contains no such restriction as our section 5, Article XIII, it shows no effort to perform the very easy task of harmonizing itself with this restriction, but, on the contrary, assumes to authorize the issuance of bonds to an amount exceeding \$10,000 upon a mere petition, and without submitting the question to the qualified electors of the county. That the incurring of an indebtedness,

whether by bonds or warrants, for the particular object contemplated by this Act is a single purpose may not be gainsaid, even though, as pointed out in *Panchot v. Leet*, 50 Mont. 314, 321, 146 Pac. 927, the aggregate of disbursements to the general poor cannot be so regarded. Being a single purpose, section 5 of Article XIII is an automatic limit to the indebtedness which may be incurred for such purpose without submission to the electors, and the Act must be construed with reference to this limitation unless it be wholly annulled. The mere absence of provisions for such submission would not be serious, since the general law (Rev. Codes, secs. 2933–2938) provides the method in such cases, if this Act could always be operated in connection with the general law. Unfortunately the contrary is true; the commands of this Act are so inconsistent with the general law as to negative any intent to include the general law by contemplation. To illustrate: Under the present Act, petitions for the issuance of seed grain may be filed as late as April 1, applications for the grain itself not later; the board must consider all the applications, filing its complete adjustment by April 10; as soon as this is done, an order for the grain shall issue, but no distribution of grain may occur before April 5. In other words, the board may, and possibly must, entertain petitions for the issuance of bonds, issue them, get the proceeds, buy the grain, receive applications, pass on them, and distribute the grain—all in the ten days between April 1 and 10, both inclusive. This is expedition indeed, and not objectionable when no resort to the electors is required; but it cannot be pursued consistently with the provisions of the general law, requiring ten days' publication of the election proclamation (Rev. Codes, secs. 2935, 454, 455), eight days' posting in each precinct of the names of the electors qualified to vote thereon (Laws 1915, Chap. 122, secs. 17, 32), thirty days' closing of the registration books after thirty days' notice of such closing (Laws 1913, Chap. 74, secs. 7, 18; *State ex rel. Kehoe v. Stromme*, 49 Mont. 25, 139 Pac. 1002; Laws 1915, Chap. 122, secs. 16, 32; Laws 1915, Chap. 130, sec. 7), and, following the election, ten days or more to canvass the returns and de-

clare the result (Rev. Codes, secs. 2933, 588-590). We are thus compelled to infer that the legislature, in framing this Act as it did and excluding the machinery by which an indebtedness of more than \$10,000 could be authorized, never intended to permit any such indebtedness under it. To make it otherwise—by changing its term so to admit the operation of the general law relating to elections, or by prescribing special rules for the submission of this particular subject of indebtedness—is within the power of the legislature alone; until that is done, the scope of this Act stands limited by the Constitution to \$10,000 for each county.

3. But though the Act itself may be upheld to the extent just stated, the proceedings here questioned may not, because they contemplated an expenditure of more than \$10,000 for the particular object, and because they are not otherwise in conformity with the Act. Its purpose, as we have seen, is the relief of needy farmers who are unable to procure seed, and its benefits cannot be confined to those who have estates of freehold; yet this is precisely what the defendants propose to do and what they are submitting to the electors as their intention. Moreover, the Act limits the amount of warrants to be issued upon any one occasion to \$3,000, and does not authorize this form of indebtedness multiplied a hundred-fold; but the action deliberately resolved and determined upon by the defendants is to issue warrants in the sum of \$300,000. For these reasons the election cannot be allowed to proceed.

The demurrer to the complaint must be overruled; and as, according to our understanding, it was intended to present the decisive issue of law, no pleading by the defendants different in substance from the complaint being possible, it follows that a final decree according to the plaintiff's prayer should issue. So ordered.

MR. JUSTICE HOLLOWAY concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, did not hear the argument and takes no part in the foregoing decision.

STATE EX REL. FORD, RELATOR, v. YOUNG ET AL.,
RESPONDENTS.

(Nos. 4,136 and 4,137.)

(Submitted January 28, 1918. Decided February 2, 1918.)

[170 Pac. 947.]

*Nuisances—Brothels—Abatement—Injunction—Powers of Attorney General—Statutes—Common Law.**Nuisances—Abatement—Powers of Attorney General.*

1. *Held*, that the authority of the attorney general conferred by the Constitution, the statutes and the common law, to institute and prosecute in the name of the state proceedings to abate, as nuisances, buildings used as common brothels or bawdy-houses, was not abridged by the provision of Chapter 95, Laws of 1917, under which the county attorney must, or any citizen of the county may, maintain a like action, the purpose of such provision being to supplement, not to supersede, existing statutes.

[As to who may obtain an injunction against a public nuisance, see note in 67 Am. Dec. 203.]

Attorney General—Common-law Duties.

2. The office of the attorney general as it existed in England under the common law was adopted as a part of the governmental machinery of this state, and in the absence of express restrictions, the common-law duties of that officer attach themselves to the office so far as they are applicable and in harmony with our system of government.

As to injunction at suit of state against public nuisance which is also a crime, see notes in 15 L. R. A. (n. s.) 747; 23 L. R. A. (n. s.) 691; 33 L. R. A. (n. s.) 325.

On right of owner or occupant of neighboring property to enjoin the maintenance of a house of prostitution, see notes in 11 L. R. A. (n. s.) 1060; 42 L. R. A. (n. s.) 1041.

Appeal from District Court, Hill County; W. B. Rhoades, Judge.

TWO PROCEEDINGS by the State, on the relation of S. C. Ford, Attorney General, against C. W. Young and others. From an order in each suit refusing to dissolve a temporary injunction, defendants appeal. Affirmed.

Mr. O. W. McConnell and Messrs. Donnelly & Carleton, for Appellants, submitted a brief; Mr. Jos. P. Donnelly argued the cause orally.

Mr. S. C. Ford, Attorney General, for Respondent, and *Mr. A. A. Gyorud*, Assistant Attorney General, submitted a brief, and *Mr. Ford* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The state, on the relation of the attorney general, seeks by injunction to close certain buildings in the city of Havre, which it is alleged are being used as common brothels or bawdy-houses. The defendants have appealed from an order (in each suit) refusing to dissolve a temporary injunction.

No question is raised as to the scope of the injunction issued. [1] Appellants' only contention is that the attorney general is without authority to institute these proceedings, and in support of this contention they invoke the provisions of Chapter 95, Laws of 1917. Section 2 of that Chapter includes certain buildings and places within the definition of "nuisance." Section 3 provides: "Whenever there is a reason to believe that such nuisance is kept, maintained, or exists in any county of the state of Montana, the county attorney must, or any citizen of the county may, maintain an action in equity in the name of the state of Montana upon the relation of such county attorney or citizen, as the case may be, to abate and prevent such nuisance."

Prior to the enactment of Chapter 95, the term "nuisance" was defined by section 6162, Revised Codes, and "public nuisance" by section 6163. As against a public nuisance, the remedies available were criminal prosecution, civil action, or abatement. (Sec. 6169.) The language employed in these statutes is very general in its terms. The definitions of "nuisance" and "public nuisance" are substantially those of the common law. (3 Blackstone, 216.) Section 6169 does not indicate the character of civil remedy available nor the party plaintiff who might invoke the remedy. These questions were referable for solution to the rules which governed the usual course of practice in the courts at the time the statute was enacted.

By section 11, Article VIII, of our state Constitution, the district courts are clothed with general equity jurisdiction. At the time of the adoption of the Constitution and for many years before, courts of equity in England and America exercised jurisdiction for the suppression of nuisances—public as well as private. (*Attorney General v. Richards*, 2 Anstr. 603; 5 Pomeroy's Equity Jurisprudence, sec. 479; 2 Story's Equity Jurisprudence, secs. 921, 923.) The right of the state to maintain these suits independently of Chapter 95 cannot be questioned (*Joyce on Nuisances*, secs. 366, 437), but the state cannot act *sua sponte*. Someone authorized to do so must act on its behalf. May the attorney general do so?

The office of attorney general is of ancient origin. The powers and duties appertaining to it were recognized by the common law, and the common law has been a part of our system of jurisprudence from the organization of Montana territory to the present day. (Bannack Statutes, p. 356; Comp. Stats., p. 647; Rev. Codes, sec. 3552.) In this state the office of attorney general is created by our state Constitution (sec. 1, Art. VII), which also provides that the incumbent of the office "shall perform such duties as are prescribed in this Constitution and by the laws of the state." The Constitution enumerates certain duties, and section 193, Revised Codes, certain others, and then concludes by imposing upon the attorney general "other duties prescribed by law." It is the general consensus of opinion that in practically every state of this Union [2] whose basis of jurisprudence is the common law, the office of attorney general, as it existed in England, was adopted as a part of the governmental machinery, and that in the absence of express restrictions, the common-law duties attach themselves to the office so far as they are applicable and in harmony with our system of government. (6 Corpus Juris, 805, 809; 2 R. C. L., p. 916; *Hunt v. Chicago, H. & D. Ry. Co.*, 121 Ill. 638, 13 N. E. 176; *Ex parte Young*, 209 U. S. 123, 14 Ann. Cas. 764, 13 L. R. A. (n. s.) 932, 52 L. Ed. 714, 28 Sup. Ct. Rep. 441; *State v. Robinson*, 101 Minn. 277, 20 L. R. A. (n. s.) 1127,

112 N. W. 269.) Among the duties especially enjoined upon the attorney general at common law was "by information to chancery to enforce trusts and prevent public nuisances." (*People v. Miner*, 2 Lans. (N. Y.) 396; 2 R. C. L. 916.) In *Attorney General v. Forbes*, 2 Mylne & C. 123, Lord Chancellor Cottenham said: "In informations and proceedings for the purpose of preventing public nuisances, the ordinary course is for the attorney general to take it on himself to sue as representing the public." In *City of Georgetown v. Alexandria Canal Co.*, 12 Pet. (U. S.) 91, 9 L. Ed. 1012, it is said that it is "now settled that a court of equity may take jurisdiction in cases of public nuisances by an information filed by the attorney general." To the same effect are *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 36 L. Ed. 537, 12 Sup. Ct. Rep. 689; *Attorney General v. Jamaica Pond Aqueduct Corp.*, 133 Mass. 361; *People v. Truckee Lumber Co.*, 116 Cal. 397, 58 Am. St. Rep. 183, 39 L. R. A. 581, 48 Pac. 374; *State v. Lord*, 28 Or. 498, 31 L. R. A. 473, 43 Pac. 471; Joyce on Nuisances, sec. 437.

It cannot be questioned that prior to the enactment of Chapter 95 these suits might have been maintained by the state on the relation of the attorney general, for a bawdy-house was a public nuisance at common law (4 Blackstone, 168), and also under section 6163 above. What, then, is the effect of the provisions of Chapter 95? We shall not stop to consider whether it is competent for the legislature to abridge the powers of the attorney general's office, for in our opinion it has not undertaken to do so by this statute. Chapter 95 does not undertake to define a nuisance, but to enlarge the definition of the term as given by prior statutes. It does not create a new remedy, but makes certain the extent of the relief obtainable. It does not supplant the attorney general as a proper party who may invoke the remedy on behalf of the state, but extends the law by conferring upon the private citizen the right, and upon the county attorney the duty, to suppress the particular nuisances mentioned, by the restraining process of a court of equity. The purpose of Chapter 95 is to supplement, not to supersede, exist-

ing statutes. The case of *State ex rel. Nolan v. District Court*, 22 Mont. 25, 55 Pac. 916, is not in point here, but in principle it sustains these views rather than militates against them. Decided cases are to be found which deny to the attorney general the authority to institute such a suit under like circumstances, but we are not impressed with their reasoning, and prefer to adopt the view that these suits are properly entitled, and that the attorney general has not transcended the authority conferred upon him by the Constitution, the statutes, and the common law.

The order in each instance is affirmed.

Affirmed.

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, did not hear the argument, and takes no part in the foregoing decision.

COLLINS, RESPONDENT, v. THODE, APPELLANT.

(No. 3,857.)

(Submitted January 10, 1918. Decided February 2, 1918.)

[170 Pac. 940.]

Real Property — Ejectment — Adverse Possession—Evidence—Insufficiency.

Ejectment—Prima Facie Case—Sufficiency.

1. In an action seeking recovery of possession of realty claimed by defendant under title by adverse possession, evidence that plaintiff became the owner at a certain time and continued as such in possession, supplemented by the legal presumption that a thing once proved to exist continues as long as is usual with things of that nature, was sufficient, in the absence of proof to the contrary, to make a *prima facie* case in behalf of plaintiff.

Same—Adverse Possession—Essentials.

2. Possession of realty, to be adverse, must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under the statute of limitations.

[As to what is essential to adverse possession, see notes in 28 Am. St. Rep. 158; 88 Am. St. Rep. 701.]

Same.

3. Where the adverse claimant never asserted to anyone any claim

to the land in question and never told the owner of it, the possession must have been of such a character as to give the owner notice of the hostile claim, else it is not "adverse."

Same—Evidence—Insufficiency.

4. Evidence disclosing *inter alia* that the alleged adverse possession claimed by defendant had its inception in the possession of her son who had moved his house upon the land and with whom she lived, but who never himself asserted any claim to the premises, made neither answer nor testified in the action, *held* insufficient to show that she ever had such possession as could ripen into title.

Appeal from District Court, Cascade County; H. H. Ewing, Judge.

ACTION for possession of real estate by Lovinia A. Collins against Mary J. Thode. Judgment for plaintiff, and the named defendant appeals. Affirmed.

Cause submitted on briefs of counsel.

Mr. Stephen J. Cowley, for Appellant.

The court invaded the province of the jury in directing what its verdict should be in this case. The question as to whether or not defendant had acquired title to the premises in controversy by adverse possession was one for the jury solely. (*Bannes v. Light*, 116 N. Y. 34, 22 N. E. 441; *Harrison v. Spencer*, 90 Mich. 586, 51 N. W. 642; *Murray v. Romine*, 60 Neb. 94, 82 N. W. 318; *Illinois Steel Co. v. Jeka*, 123 Wis. 419, 101 N. W. 399.) It is not the notoriety of claim of title by one in adverse possession that the statute contemplates, but rather the notorious occupation of the premises. (*Carter v. Clark*, 92 Me. 225, 42 Atl. 398; *Barnes v. Light*, 116 N. Y. 34, 22 N. E. 441; *Seymour v. Over River School Dist.* (Conn.), 4 Atl. 246.) The same matter was disposed of by the Minnesota supreme court in the case of *Kelly v. Palmer*, 91 Minn. 133, 97 N. W. 578. The action was one in ejectment in which counsel for plaintiff requested the court to charge the jury that: "In order to recover, the defendant must bring home notice to the true owner." The trial court declined to give the requested instruction and his refusal was sustained.

If one enters upon the property of another and commences filling in the low places thereon, or making improvements, he thereby indicates to the true owner, if the latter pays reasonable attention to his property, a hostile purpose to adversely appropriate such premises, and he thereby effectually plants thereon the standard of a hostile invader. (*Illinois Steel Co. v. Jeka, supra.*) The intent to claim by adverse possession may be inferred from the matter of the occupancy. (*Dean v. Goddard*, 55 Minn. 290, 56 N. W. 1060.)

Messrs. Cooper, Stephenson & Hoover, for Respondent.

Since title to the premises is undoubtedly in the plaintiff, she was entitled to the relief asked for in the complaint unless defendant introduced sufficient evidence to establish her claim of ownership by adverse possession. The case was rested by defendant upon her own testimony, and it is our contention that she did not introduce sufficient evidence to make it possible for the jury to find in her favor upon the issue of adverse possession.

The burden is placed upon the defendant to show that she held the property adversely to plaintiff's legal title for a period of ten years before the commencement of the action. (1 Cyc. 1143-1145.)

It is a presumption of law and of evidence that the possession of a member of the family, whether father, child, husband or wife, is the same as, or in subordination to, that of the head of the family. In the case of *Hoyt v. Zumwalt*, 149 Cal. 381, 86 Pac. 600, the court says: "If Isaiah Zumwalt gave his son the money to pay for the land upon the sole condition that he should be provided with a home there, his subsequent residence on the premises as a member of the family did not constitute possession, and certainly there was nothing to give it the character of an exclusive or adverse possession." Where husband and wife live together, it is a presumption of law that the wife's possession is subordinate to and under the right and title of the husband. (See, also, *Frink v. Alsip*, 49 Cal. 103; *First Nat.*

Bank v. Guerra, 61 Cal. 113; *Gafford v. Strauss*, 89 Ala. 283, 18 Am. St. Rep. 111, 7 South. 248; *Bannon v. Brandon*, 34 Pa. 263, 75 Am. Dec. 655; *Mitchell v. Murphy*, 43 Fed. 427.) The mother's possession was not such as to charge persons dealing with the property with a knowledge of her claims, whether real or fancied. (*Rankin v. Coar*, 46 N. J. Eq. 566, 11 L. R. A. 661, 22 Atl. 177; *Atlanta Nat. Building & Loan Assn. v. Gilmer*, 128 Fed. 295; note to *Garbutt v. Mayo*, 13 L. R. A. (n. s.) subd. i, 131.)

Under certain circumstances such as those set forth in the many cases referred to in appellant's brief, mere possession and use of property is sufficient to give notice to the owner that his rights are invaded. But where her possession was entirely consistent with the claim of her son and was of such a nature that any prudent person would consider that she was merely living with her son as a member of his family, the burden devolved upon her to make her claim in a positive and unequivocal manner. (*Potts v. Coleman*, 67 Ala. 221; *Mauldin v. Cox*, 67 Cal. 387, 392, 7 Pac. 804; *Allen v. Allen*, 58 Wis. 202, 16 N. W. 610, 614.)

HONORABLE C. C. HURLEY, Judge of the Seventh Judicial District, sitting in place of the Chief Justice, delivered the opinion of the court.

In this action the plaintiff seeks to recover the possession of lot 3 in block 359 of the town site of Great Falls, which lot plaintiff alleges the defendants possess and are wrongfully withholding from her.

The defendant Mary J. Thode answered, and denied each and every allegation in plaintiff's complaint, and alleged as an affirmative defense that she has been in possession of the north 110 feet of said lot since April, 1902; that she has held the same openly, actually, notoriously, continuously, exclusively, adversely and uninterruptedly for that time, and has continuously used said premises as a home, residing thereon, and cultivated and improved the same; and that she claims the same as

her own, adversely and hostile to the claim of the plaintiff or any person or persons whomsoever. Upon the trial of the case it was stipulated in open court that the title to the lot in question was in the Great Falls Townsite Company until August, 1902, and was transferred to the plaintiff on the nineteenth day of August, 1902. The plaintiff then rested, and the defendant moved for a nonsuit, which was overruled.

The defendant Mary J. Thode then testified that she is a sister of the plaintiff; that she has occupied the north 110 feet of the lot in question since 1902, and has resided thereon continuously and exclusively, and has never shared the same with anyone else; that she has maintained her home thereon since April, 1902, and intends to continue; that she learned in 1902 that either the plaintiff or her husband owned the lot; that plaintiff's husband owed the defendant money and would not pay it, and she determined to go on the lot in question for the purpose of holding possession of it against everybody, including Mr. and Mrs. Collins, and live on the lot for the purpose of getting title by adverse possession; that she had been advised at that time that she could obtain title by adverse possession; that she did not have anybody's consent or permission to go on the lot; that since April, 1902, she has cultivated and improved the lot, by cutting the grass on the front and on the side, grown vegetables in the back of the lot, kept a hotbed, driveway and clothesline, and a house and barn upon the lot in question; that she cultivated the full 110 feet of such lot each and every year, except that portion upon which the house was located; that she raked up and burned the rubbish off of the full 110 feet of said lot twice a year; that the house has been upon the lot in question since 1902, and the barn was moved upon the same two years later; that the front part of the said lot was never fenced, but the other three sides were fenced, sometimes with one strand of wire and sometimes with two; that her possession of the land in question has not been interrupted since 1902; that her possession has been open and aboveboard, and has never been questioned until this action was instituted; that she did not know

whether the lot in question was owned by Mr. or Mrs. Collins until after Mr. Collins' death; that she thought Mr. Collins would give her the north 110 feet of the lot before he died, for the reason that he owed her some money; that she always believed that he would either deed the lot to her, or will it to her, and was disappointed when he did not; that she never told anyone of her claim to the lot; that she has lived upon the lot with her son, who is forty years old; that previous to moving upon the lot she and her son resided in a house located upon other land, which house had been built by her son; that she had no income of her own, and her son provides the means for supplying the house; that the house was moved upon the land in question by a person employed and paid by her son; that she has never paid any taxes upon the land or the house in question, and if there were any taxes paid upon the house they were paid by her son; that the barn which was moved upon the premises belonged to her son; that she never "opened her head" to plaintiff, or gave her any intimation that she intended to claim the lot; that she had no talk with her about it, and never let the plaintiff know that she intended to claim the lot; that she did not know why she did not tell her about it; that she did not happen to say anything about it—"Why should I say anything to her?" that she never gave plaintiff any reason to suppose defendant intended to claim the lot, in any talk; that she never gave the plaintiff any reason to suspect that she had a secret intention to obtain the lot; that neither she nor her son ever paid any taxes on the lot; that she did not know who built the sidewalk in front of the lot, or who paid for it; that she never gave herself any concern about that.

The defendant Mary J. Thode was the only witness who testified in this case. At the conclusion of her testimony the court directed a verdict for the plaintiff, and judgment was entered accordingly. This appeal is from that judgment.

Two questions are presented for determination, *viz.*:

(1) Did the court err in overruling defendant's motion for a nonsuit?

(2) Was the evidence offered by the defendant sufficient to show *prima facie* that the defendant had possession of the ground in question under such circumstances as would give her title by adverse possession?

1. It is admitted that the plaintiff obtained title to the [1] ground in question on August 19, 1902. Section 6435, Revised Codes, provides: "In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof, within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title, for ten years before the commencement of the action." The law also presumes that a thing, once proved to exist, continues as long as is usual with things of that nature. (Subd. 32, sec. 7962, Rev. Codes.) Under this admission and these presumptions of law the evidence was sufficient to justify, in the absence of proof to the contrary, that the plaintiff became the owner and possessed of the ground in question on August 19, 1902, and continued as such owner and in such possession. This would be sufficient to make a *prima facie* case in behalf of the plaintiff. There was no error in overruling defendant's motion for nonsuit.

2. "Adverse possession, generally speaking, is a possession of another's land, which, when accompanied by certain acts and circumstances, will vest title in the possessor. No matter in what jurisdiction the determination of what constitutes adverse [2] possession may arise, the decisions and text-books are unanimous in declaring that the possession must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under the statute of limitations." (2 Corpus Juris, 50.) It is also held by the great weight of authority that title by adverse possession cannot be acquired unless the possession is open and notorious, or such as to give the owner of the property either actual knowledge of the hostile claim,

or of such a character as to raise a presumption of notice, or so patent that the owner could not be deceived.

In 2 Corpus Juris, 75, it is said: "It is in general true that title by adverse possession cannot be acquired, unless the possession is open and notorious, but the rule must be understood with some qualification. A more correct statement of the rule is: In order to make good a claim of title by adverse holding, the true owner must have actual knowledge of the hostile claim, or the possession must be so open, visible, and notorious as to raise the presumption of notice to the world that the right of the true owner is invaded intentionally, and with a purpose to assert a claim of title adversely to his, or so patent that the owner could not be deceived, and such that if he remains in ignorance it is his own fault. 'The claimant must exercise such acts of ownership and occupancy as are sufficient to "hoist his flag" over the lands, so that all may observe it.' A clandestine entry or possession will not set the statute in motion, and mere declarations as to title in himself by the claimant, where the possession is not visible or actual, amount to nothing. The owner will not be condemned to lose his land because he has failed to sue for its recovery, when he had no notice that it was held or claimed adversely."

Hostile possession is defined in 2 Corpus Juris, p. 122, as follows: "The term 'hostile' is used in the sense that the claimant must be in possession as owner, in contradistinction to holding in recognition of or in subordination to the true owner. Every possession is adverse which is not in subservience to the title of another, either by a direct acknowledgment or by an open or tacit disavowal of right on the part of the occupant, and it is in the latter case only that the law adjudges the possession of one to the benefit of another. The term 'hostile,' 'when applied to the possession of an occupant of real estate holding adversely, is not to be construed as showing ill will, or that [the claimant] is an enemy of the person holding the legal title, but means an occupant who holds, and is in possession, as owner, and therefore against all other claimants of the land.' "

Under these rules, is the evidence offered by the defendant sufficient to show *prima facie* that she had acquired the land in question by adverse possession? We think not.

The defendant admits that she never asserted to anyone [3] any adverse claim to the land, and particularly that she never told the owner of her claim. Under these circumstances it is necessary that her possession should be of such a character as to give the owner notice of her hostile claim to the land in question. (*Rude v. Marshall*, 54 Mont. 27, 166 Pac. 298.)

When the defendant's son had his house moved upon the [4] land, if it was done without any authority from the owner thereof, that circumstance would be sufficient to show his intention to challenge the right of the owner to that land; but there is nothing in this circumstance from which the plaintiff or anyone else could infer an intention on the part of any other person to assert any claim to the premises. If Henry E. Thode, after moving upon the premises in question, as detailed by the defendant, had employed a servant who occupied the house with him, or had permitted some friend or acquaintance to reside therein and live upon the provisions supplied by him, there would be nothing from either of these circumstances from which it could be inferred that anyone other than Henry E. Thode was asserting any claim to the premises. As we view the matter, the defendant's claim does not present as strong a case as either of these examples. The defendant is the mother of Henry E. Thode. He is under both legal and moral obligation to render her support. It is natural for a son to support and care for his mother, and the fact that the defendant occupied her son's house with him would raise no presumption, other than that he was doing his duty as a son. It seems clear to us that the possession of the premises in question at its inception was the possession of Henry E. Thode. That possession is disclosed by the testimony of the defendant. If it was had without authority of the owner of the premises, that would have been sufficient to vest title in Henry E. Thode, by adverse possession; but he has made no answer in this action, and did not

testify. Nowhere is it claimed that he ever asserted any adverse claim to the premises. Let us assume, for the sake of argument, that Henry E. Thode, at the time he moved his house upon these premises, did so under some express authority from the owner thereof, and continued to occupy the same pursuant to such authority. Under these circumstances he could never acquire any right to the premises by adverse possession, and the owner of the premises would be under no obligation to make any inquiry as to the rights or claims of anyone else who might occupy the premises with him; and it will be presumed that anyone else who so occupied the premises did so either at the invitation or sufferance of Henry E. Thode. In the absence of proof it cannot be presumed that he went wrongfully upon the premises in question, but it will be presumed that he occupied the same under authority of the owner. Under these circumstances he could never acquire title by adverse possession, and those who occupied the premises with him could never acquire any greater right to the same than he.

In this case, the rights of the answering defendant can be such only as would accrue if Henry E. Thode occupied the premises in question under authority of the owner. If she occupied the premises pursuant to permission of Henry E. Thode, such possession would be equivalent to permission from the owner of the premises, and subservient to the owner's rights, and she could never acquire any right under such possession, greater than the rights of Henry E. Thode. Such possession could not be hostile to that of the owner of the premises.

In our opinion, the evidence offered by the defendant fails absolutely to show that she ever at any time had such possession of the premises in question as could ripen into title.

We find no error in this case. The judgment is affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

YOUNG, RESPONDENT, v. BRAY, APPELLANT.

(No. 3,865.)

(Submitted January 30, 1918. Decided February 6, 1918.)

[170 Pac. 1044.]

*Chattel Mortgages—Conversion of Mortgaged Property—Complaint—Insufficiency—Bills and Notes—Waiver of Tort—Assumpsit.**Conversion of Mortgaged Property—Complaint—Insufficiency.*

1. The complaint in an action in conversion of property upon which plaintiff held a chattel mortgage, which did not allege that she held the note to secure which the mortgage was given, that the note had not been paid, and that she had some property interest in the property converted, did not state a cause of action.

[As to conversion of personalty sufficient to sustain action of trover, see note in 24 Am. St. Rep. 795.]

Conversion—Waiver of Tort—Assumpsit.

2. One whose property has been wrongfully converted may waive the tort and sue in *assumpsit*, in which event the measure of damages is the value of the property at the date of the conversion, not to exceed the amount due plaintiff; hence the complaint must allege such value.

Same—Promissory Notes—Complaint—Insufficiency.

3. The complaint above adverted to was further insufficient for failure to allege that plaintiff was the holder of the note at the time action was commenced.

Promissory Notes—Who not Liable Thereon.

4. One whose name does not appear upon a promissory note cannot be held liable on it (Rev. Codes, sec. 5866).

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

ACTION by Margaret Young against Montford Bray. From a judgment for plaintiff and an order denying new trial, defendant appeals. Reversed and remanded.

Cause submitted on brief of counsel for Appellant.

Messrs. Farr & Herrick, for Appellant.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In her complaint plaintiff alleges, in substance, that on May 23, 1914, Prentiss R. Lewis executed and delivered to her his negotiable, promissory note for \$150, with interest at ten per cent per annum, and, to secure payment, executed a chattel mortgage upon certain personal property, which mortgage was duly filed for record; that subsequently, and while the lien of the mortgage was in full force and effect, Lewis transferred the mortgaged property to defendant, who thereafter converted it to his own use and deprived plaintiff of her security; that by reason of such conversion defendant is indebted to plaintiff for the direct payment of money in the sum of \$150, principal of said note, with interest according to the terms of the note; that plaintiff is entitled to a reasonable attorney fee under the terms of the note; that \$100 is such reasonable fee to be allowed plaintiff; and that prior to commencing this action plaintiff demanded of defendant that he pay the amount of the mortgage "upon the ground that he had assumed said mortgage and was directly liable to this plaintiff," but that defendant refused to pay the same or any part thereof. The answer is a general denial. Timely objection was interposed to the introduction of any evidence on the ground that the complaint fails to state a cause of action, and particularly that it fails to disclose that plaintiff is the owner or holder of the note or mortgage, or that she has any interest in the subject matter of the litigation. The objection was overruled. Plaintiff prevailed in the lower court, and defendant appealed from the judgment and from an order denying him a new trial.

It is practically impossible to determine the theory upon which plaintiff proceeds. It is problematical whether she seeks damages for the conversion of her security, whether she waives the tort, and is suing upon an implied contract, or whether it is sought to hold defendant upon an agreement to pay the debt; but upon any theory the complaint does not state a cause of action in favor of plaintiff and against defendant.

1. It does not state a cause of action for damages for [1] conversion. (*Harrington v. Stromberg-Mullins Co.*, 29 Mont. 157, 74 Pac. 413.)

2. It does not state a cause of action upon an implied contract. The right of one, whose property has been wrongfully [2] converted, to waive the tort and sue in *assumpsit* is well settled. (*First Nat. Bank v. Silver*, 45 Mont. 231, 122 Pac. 584.) The right to sue in *assumpsit* proceeds upon the theory of implied sale—that the one who converted the property intended to compensate the owner for it. (*Galvin v. Mac Mining & M. Co.*, 14 Mont. 508, 37 Pac. 366.) It may be a serious question whether a mortgagee of personal property out of possession has such right of election. Upon this we express no opinion; but if the right exists, the measure of damages is the value of the property at the date of conversion, not to exceed the amount due on plaintiff's debt. (*Harrington v. Stromberg-Mullins Co.*, above.) To state a cause of action, the value of the property at the date of conversion must be made to appear. (*Monroe v. Cannon*, 24 Mont. 316, 81 Am. St. Rep. 439, 61 Pac. 863.) In this instance the complaint fails to state that at the date of conversion the property had any value whatever.

3. It is only by bare inference that it can be said to appear that defendant ever assumed or agreed to pay the debt secured by the mortgage. There is no direct allegation to that effect. [3] But it is incumbent upon plaintiff to disclose that she is the real party in interest, and to do so it must be made to appear that at the time this action was commenced, the debt was due to her. Nowhere is it alleged that plaintiff is the owner or holder of the note, and for this reason the complaint is fatally defective. (*J. I. Case Threshing Mach. Co. v. Simpson*, ante, p. 316, 170 Pac. 12.) Furthermore, the defendant [4] cannot be liable on the note itself, for his name does not appear upon it. (Rev. Codes, sec. 5866; *Kohrs v. Smith*, 45 Mont. 467, 124 Pac. 275.)

The complaint does not state a cause of action upon any theory, and will not support the judgment.

The judgment and order are reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, did not hear the argument and takes no part in the foregoing decision.

IN RE LONDOS.

(No. 4,177.)

(Submitted February 4, 1918. Decided February 9, 1918.)

[170 Pac. 1045.]

Criminal Law—Gaming—Misdemeanors—Fines and Imprisonment—Habeas Corpus.

Misdemeanors—Fines and Imprisonment—District Courts—Jurisdiction.

1. *Held*, on *habeas corpus*, that the district court has the power, under section 9371, Revised Codes, to impose a sentence of imprisonment in the county jail for a certain number of days, defendant in addition to pay a fine in a stated amount, and, in default of payment, to stand committed one day for every two dollars of the fine after expiration of the term of imprisonment, until the fine is paid.

Same—Fines—Imprisonment—Mode of Collection.

2. *Held*, that that portion of the judgment above providing for a term of imprisonment equal to one day for every two dollars of the fine in case of nonpayment is not a part of the judgment, but represents the common-law mode of executing the sentence, that is, of enforcing the payment of the fine.

[As to power to imprison until the fine be paid, see note in 12 Am. St. Rep. 202.]

(In Chambers.)

Original application of William Londos for a writ of *habeas corpus*. Writ quashed and complainant remanded to custody.

Mr. R. C. Stong, for Complainant, submitted a brief.

MR. JUSTICE HOLLOWAY delivered the opinion.

On December 1, 1917, William Londos pleaded guilty to a charge of gambling, and was sentenced to imprisonment in the county jail for a term of thirty days, and to pay a fine of \$250. The judgment provides that if the fine be not paid, the defendant shall stand committed for a term equal to one day for every \$2 of the fine after the expiration of the thirty days' imprisonment. The prisoner having served his term of thirty days applies for his release from custody upon the theory that our statutes do not authorize the imposition of imprisonment to satisfy the fine in any case where the punishment imposed is a definite term of imprisonment and a fine in addition thereto.

By Chapter 86, Laws of 1917, the punishment prescribed for a violation of the anti-gambling law is (1) a fine not less than \$100, nor more than \$1,000, or (2) imprisonment in the county jail for a term not less than three months nor more than one year, or (3) both such fine and imprisonment. Sections 9371 and 9379, Revised Codes, provide:

“Sec. 9371. A judgment that the defendant pay a fine and costs may also direct that he be imprisoned until both fine and costs are satisfied, specifying the extent of the imprisonment, which must not exceed one day for every two dollars of the fine and costs.”

“Sec. 9379. If the judgment is for imprisonment, or a fine and imprisonment until it be paid, the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment is complied with.”

It is the contention of this petitioner that these statutes authorize imprisonment only in case the prisoner is adjudged [1] to pay a fine and fails to do so, or is sentenced to a definite term of imprisonment as the sole punishment, and that whenever the punishment is both fine and imprisonment the fine can be satisfied only by execution as upon a judgment in a civil action, under section 9378. These statutes are not peculiar to Montana, neither is the question raised a new one. Many of the states have similar provisions, and many applications of this

character have been made seeking relief upon the theory presented now. In California and Utah the applications have been prosecuted successfully. The decision in each state takes no notice of the common-law powers of a court of general jurisdiction, but grants relief solely upon the ground that the statutes do not expressly authorize imprisonment to satisfy the fine, when the fine is accompanied by a definite term of imprisonment as a part of the punishment. (*Ex parte Rosenheim*, 83 Cal. 388, 23 Pac. 372; *Roberts v. Howells*, 22 Utah, 389, 62 Pac. 892.) The decided weight of authority and the better reasoning hold to the contrary conclusion, which I think should be adopted in this state. (*Ex parte Bowes*, 8 Okl. Cr. 201, 127 Pac. 20; *Ex parte Morris*, 17 Ariz. 537, 155 Pac. 299; *Fisher v. McDaniel*, 9 Wyo. 457, 87 Am. St. Rep. 971, 64 Pac. 1056; *Berkenfield v. People*, 191 Ill. 272, 61 N. E. 96; *Ex parte Tongate*, 31 Ind. 370; *State v. Myers*, 44 Iowa, 580; *State v. Hyland*, 36 La. Ann. 709; *People v. Sage*, 13 App. Div. 135, 43 N. Y. Supp. 372; 19 Cyc. 553.)

If section 9371 above was intended to prescribe the mode of enforcing the penalty imposed, there would be merit in this petition; but the purpose of that section is to recognize the existing common-law method of enforcing the judgment and to fix a definite limit to the extent of the imprisonment—something the common law apparently omitted. (19 Cyc. 554.) The penalty imposed in this instance was imprisonment for thirty days and a fine of \$250. The imprisonment after the [2] expiration of the thirty days is not a part of the punishment, but the common-law mode of executing the sentence, that is, of enforcing the payment of the fine. (8 R. C. L. 270.)

The writ of *habeas corpus* heretofore issued is quashed, and the petitioner is remanded to the custody of the sheriff of Yellowstone county.

HEAVEY, RESPONDENT, v. LADEN, APPELLANT.

(No. 3,867.)

(Submitted January 31, 1918. Decided February 11, 1918.)

[170 Pac. 947.]

Record on Appeal—New Trial Order—Affirmance, When.**Appeal and Error—Record—Review.**

1. On appeal, the supreme court is bound by the record as it is presented and cannot consider matters and things not appearing therein.

Same—New Trial Order—Conflicting Evidence—Affirmance.

2. Where the evidence is in sharp conflict and the order granting a new trial is general in terms, the supreme court will not interfere on appeal.

Appeal from District Court, Beaverhead County; W. A. Clark, Judge.

ACTION by Rose Heavey against Patrick Laden. Verdict for defendant. From an order granting plaintiff's motion for new trial, defendant appeals. Affirmed.

Messrs. Pease & Stephenson, for Appellant, submitted a brief; ***Mr. Harlow F. Pease*** argued the cause orally.

Messrs. Rodgers & Gilbert, for Respondent, submitted a brief; ***Mr. Harry G. Rodgers*** argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to recover upon five separate causes of action. The defendant recovered a general verdict, but upon plaintiff's motion a new trial was granted, and this appeal is from that order.

Appellant concedes that plaintiff was entitled to a new trial [1] of her second and third causes of action, but insists that a new trial of the entire case is not warranted. This court is bound by the record as it is presented, and counsel for appel-

lant cannot insist that we consider remarks made or theories exploited in the lower court, which do not appear in the record.

One ground of the motion was insufficiency of the evidence [2] to justify the verdict. The order granting the motion is general in its terms. The evidence touching the first, fourth and fifth causes of action is in sharp conflict. Upon the authority of *Reynolds v. Jones*, 53 Mont. 251, 163 Pac. 469, and *Fadden v. Butte Miners' Union*, 50 Mont. 104, 147 Pac. 620, the order is affirmed.

Affirmed.

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, did not hear the argument and takes no part in the foregoing decision.

SCHWAB, APPELLANT, v. McVEY, RESPONDENT.

(No. 3,869.)

(Submitted February 1, 1918. Decided February 14, 1918.)

[171 Pac. 277.]

Contracts—Leases of Farm Lands—Uncertainty—Invalidity.

1. In an action by a lessor to recover his share of grain alleged to have been raised by the defendant under a contract of lease of agricultural land, the only definite portion of which was that which secured to defendant (without naming a consideration) the possession of the land for a specified time but which did not bind him to do anything or raise any grain, the contract held void for uncertainty under section 4999, Revised Codes.

[As to a lessor's reservation of lien on or title to crops raised by lessee, see note in 14 Am. St. Rep. 166.]

Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.

ACTION by George Schwab against Worth McVey. Judgment on directed verdict for defendant and order denying new trial, and plaintiff appeals. Affirmed.

Mr. H. C. Packer and *Mr. E. C. Kurtz*, for Appellant, submitted a brief; *Mr. Packer* argued the cause orally.

Mr. Geo. T. Baggs, for Respondent, submitted a brief, and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action in claim and delivery was brought to recover possession of certain grain, or its value in the event that possession cannot be had. By his answer, defendant admits that he is in possession of the property and admits its value as claimed by plaintiff. He denies all the other allegations of the complaint and, by way of affirmative defense, alleges that on March 10, 1913, he leased from plaintiff for a term of five years a ranch consisting of 800 acres of unbroken land; that during the season of 1913 he broke 127 acres; that in 1914 plaintiff solicited him to break additional ground, but that he refused to comply except upon condition that he be given the entire crop to be raised on such newly plowed ground during the first crop season; that plaintiff agreed to this condition; that he (defendant) plowed 100 acres of sod and seeded it to grain in the spring of 1915; and that the grain in controversy was raised on that 100 acres during the first crop season after it was broken. The reply admits the execution of the lease of March, 1913, and denies all other allegations of the answer. At the conclusion of the testimony the court directed a verdict for defendant, and plaintiff appealed from the judgment and from an order denying him a new trial.

There is not any substantial conflict in the evidence. Either plaintiff or defendant was entitled to prevail as a matter of law, and the only question presented by the record is: Did the trial court err in directing the verdict for defendant?

The lease of March, 1913, names the plaintiff as first party and defendant as second party, fixes the term at five years, refers to the land leased, and then contains this paragraph only: "It

being understood and agreed between both parties that no rent shall be paid for the year ending March 1, 1914, and that thereafter said first party shall receive one-third of all the crop raised each year, his share of same to be delivered at the thresher to the said first party, said second party to have the threshing done at his expense; it being also understood that one-half the increase from any stock placed upon the land during the life of this lease, by said first party, shall belong to said first party; it also being understood that any and all improvements put upon the land shall be so placed by the second party."

The trial court held this lease void for uncertainty, and held further that the only binding contract between the parties was the oral agreement of 1914, under which defendant plowed the 100 acres and raised thereon the grain in controversy.

Upon the trial, counsel for the respective parties proceeded upon the theory that the written lease is valid, that defendant [1] relies upon the oral agreement as constituting a modification of the terms of the lease, and that the only controversy arises over the question: Was that oral agreement executed or executory? If it were necessary to a determination of these appeals to do so, we should be inclined to hold that the oral agreement was fully executed and that evidence of its terms was properly admitted under section 5067, Revised Codes, or that the judgment might be justified upon a different theory, *viz.*, the lease does not require McVey to do any plowing, and therefore the agreement under which the plowing was done and the crop raised in 1915 was an agreement independent of the lease and not a modification of it; but we agree with the trial court that the lease of 1913 is void for uncertainty. The only definite provision in it secures to defendant the possession of the land for five years, but there is not any consideration for this agreement. Beyond that, the lease does not bind either party to do anything. It does not provide that any plowing shall be done. It provides that after the first year Schwab shall receive one-third of all the crops raised each year, but it does not require McVey to raise any crops. It also provides that Schwab is to

have one-half of the increase of any stock he may place on the land during the life of the lease, but it does not require him to place any stock on the land. It also provides that any and all improvements put upon the land shall be so placed by McVey, but it does not require any improvements to be placed on the land.

It is an elementary rule of law that, to constitute an enforceable contract, the agreement of the parties to it must be sufficiently certain and explicit that their full intention may be ascertained to a reasonable degree of certainty. (6 R. C. L., p. 644.) "If an agreement be so vague and indefinite that it is not possible to collect from it the full intention of the parties, it is void; for neither the court nor the jury can make an agreement for the parties." (*Price v. Stipek*, 39 Mont. 426, 104 Pac. 195.) Section 4999, Revised Codes, provides: "Where a contract has but a single object, and such object is * * * so vaguely expressed as to be wholly unascertainable, the entire contract is void."

We approve the disposition made of this case by the trial court. The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

GRANT, APPELLANT, v. WILLIAMS, JUSTICE OF THE PEACE,
ET AL., RESPONDENTS.

(No. 3,866.)

(Submitted January 31, 1918. Decided February 18, 1918.)

[171 Pac. 276.]

Malicious Prosecution — False Imprisonment — Complaint — Insufficiency.

Malicious Prosecution—Complaint—Insufficiency.

1. In an action for malicious prosecution, complaint which fails to state that defendant constable acted maliciously in instituting a proceeding against plaintiff in a justice court does not state a cause of action.

False Imprisonment—Complaint—Insufficiency.

2. Complaint in an action for false imprisonment must allege that the defendant acted without warrant or other sufficient legal process, the allegation that he acted "wrongfully" and "unlawfully" not supplying a statement of facts upon which issue could be joined.

[As to what amounts to false imprisonment, see note in 118 Am. St. Rep. 719.]

Appeal from District Court, Blaine County; John W. Tattan, Judge.

ACTION by Hugh L. Grant against W. H. Lutz, L. V. Bogy and Edward Price, and F. N. Williams as Justice of the Peace. From a judgment in favor of the first three named defendants, plaintiff appeals. Affirmed.

Mr. R. E. O'Keefe, for Appellant, submitted a brief.

Messrs. Collings & Bottomley, for Respondents, submitted a brief; *Mr. John Collins* argued the cause orally.

In order to constitute a cause of action for malicious prosecution the act of putting the machinery of the law in operation against appellant must have been done maliciously and without probable cause. (*Smith v. Davis*, 3 Mont. 109; *Grorud v. Loss*, 48 Mont. 274, 136 Pac. 1069; 26 Cyc. 74, 75.)

Lutz, the constable, cannot be held responsible for malicious prosecution for the error of the officer issuing a warrant, if his

pretended complaint did not charge a crime. (*Collum v. Turner*, 102 Ga. 534, 27 S. E. 680; *Krause v. Spiegel*, 94 Cal. 370, 28 Am. St. Rep. 137, 15 L. R. A. 707, 29 Pac. 707; *Satilla Mfg. Co. v. Cason*, 98 Ga. 14, 58 Am. St. Rep. 287, 25 S. E. 909.) It does not appear that Williams was even a justice of the peace; in fact, the contrary is implied, the proceedings complained of are extrajudicial, and an action for malicious prosecution does not lie. (*Turpin v. Remy*, 3 Blackf. (Ind.) 210, 216; *Krause v. Spiegel*, *supra*; *Newman v. Davis*, 58 Iowa, 447, 10 N. W. 852.)

Nothing in the alleged second cause of action (for false imprisonment) indicates that Lutz was not, at the time he made the arrest and confinement complained of, armed with sufficient process. The presumption is that he pursued his duties regularly. (*Stephens v. Conley*, 48 Mont. 352, Ann. Cas. 1915D, 958, 138 Pac. 189; 16 Cyc. 1076.) The failure to allege that no process had issued for the arrest of appellant is not supplied by the allegation that these acts were done, "without right of authority so to do whatsoever." To allege that an act was done "wrongfully" or "unlawfully," *etc.*, adds nothing of value to a pleading. (*Triscony v. Orr*, 49 Cal. 617; *Going v. Dinwiddie*, 86 Cal. 633, 25 Pac. 129.) To allege "that said arrest was without any legal authority, without any probable cause, and was malicious" (*McMichael v. Blasingame*, 108 Ga. 298, 33 S. E. 968), or that an order of commitment was made "knowingly, maliciously, arbitrarily, and oppressively, without right, jurisdiction or authority of law" (*Olmsted v. Edson*, 71 Neb. 17, 98 N. W. 415; *King v. Johnston*, 81 Wis. 578, 51 N. W. 1011), or that defendant arrested plaintiff "under color of process" (*Barfield v. Turner*, 101 N. C. 357, 8 S. E. 115), does not tender an issue.

Wrongful acts done by an officer merely under color of office and which are not done by virtue of his office give rise to no liability against his sureties. (*Gerber v. Ackley*, 37 Wis. 43, 19 Am. Rep. 751; *People v. Pacific Surety Co.*, 50 Colo. 273, Ann. Cas. 1912C, 577, 109 Pac. 961; *Felonicher v. Stingley*, 142 Cal. 630, 76 Pac. 504.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The facts out of which this controversy arises are set forth fully in *Grant v. Williams, ante*, p. 246, 169 Pac. 286. This appeal is from the judgment in favor of defendant Lutz and his sureties, Bogy and Price.

1. It is not alleged in the complaint that Lutz acted maliciously [1] in instituting the proceedings in the justice court, and for this reason a cause of action for malicious prosecution is not stated. (*Smith v. Davis*, 3 Mont. 109; *Grorud v. Lossel*, 48 Mont. 274, 136 Pac. 1069; *Stephens v. Conley*, 48 Mont. 352, Ann. Cas. 1915D, 958, 138 Pac. 189.)

2. The complaint charges that defendant Lutz acted in his [2] official capacity as town marshal of Chinook when he arrested the plaintiff, but it fails to allege that he acted without warrant or other sufficient legal process. From the facts stated, the presumption arises that Lutz performed an official duty in a regular manner (Rev. Codes, sec. 7962, subd. 15), and to make out a cause of action for false imprisonment the burden was imposed upon the plaintiff to state facts sufficient to overcome this presumption and to disclose wherein the violation of his liberty was unlawful. This he failed to do. The most extravagant use of the terms "wrongfully" and "unlawfully" will not serve to relieve the pleader of the necessity of stating facts upon which issue may be joined. (*Going v. Dinwiddie*, 86 Cal. 633, 25 Pac. 129.)

The complaint does not state a cause of action, and the court ruled correctly in sustaining the demurrer.

The judgment is affirmed.

Affirmed.

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

DAVIS, APPELLANT, v. STEWART, GOVERNOR, ET AL.,
RESPONDENTS.

(No. 4,127.)

(Submitted January 7, 1918. Decided February 18, 1918.)

[171 Pac. 281.]

*Constitution—School Lands—Sale—“Town”—Three-mile Limit
—Definition.*

Constitution—School Lands—Sale—“Town”—Definition.

1. *Held*, that “town” within the meaning of section 1, Article XVII, of the state Constitution, prohibiting sales of school lands within three miles of the limits of a town, is an aggregation of inhabitants and houses used for various purposes so close to one another that the inhabitants may be said to dwell together, upon a regularly platted town site, whether incorporated or not.

Same—Town—Three-mile Limit—How Measured.

2. *Held*, that the three-mile distance from the limits of towns within which school lands cannot be sold under the inhibition of section 1, Article XVII, of the Constitution, must be measured from the nearest point upon the town-site plat.

Appeal from District Court, Chouteau County; John W. Tattan, Judge.

ACTION by Albert H. Davis against Samuel V. Stewart, as Governor and others, constituting the State Land Board. Judgment for defendants and plaintiff appeals. Affirmed.

Messrs. Stranahan & Stranahan, for Appellant, and *Mr. Wm. T. Pigott*, of Counsel, submitted a brief; *Mr. Pigott* and *Mr. C. W. Wiley*, also of Counsel, argued the cause orally.

Mr. S. C. Ford, Attorney General, and *Mr. R. L. Mitchell*, Assistant Attorney General, for Respondents, submitted a brief; *Mr. Mitchell* argued the cause orally.

HONORABLE A. C. SPENCER, a Judge of the Thirteenth Judicial District, sitting in place of the Chief Justice, delivered the opinion of the court.

This action was submitted to the district court of Chouteau county, upon an agreed statement of facts, presenting for decision the following question: "Is Square Butte a 'town' within the meaning of Article XVII, section 1, of the Constitution of the state of Montana, so as to prevent the sale of a quarter-section of state land lying within three miles thereof?" The court answered in the affirmative and, in accord with the stipulation that such answer should be followed by a dismissal of the action, judgment for the defendants was entered. From that judgment the plaintiff appeals.

The agreed statement shows: That at an auction duly advertised by the respondents and held May 4, 1915, there was offered for sale a certain tract of state lands containing 172.72 acres and lying within three miles of Square Butte in Chouteau county; that the appellant who was and is a person qualified to purchase state lands attended said sale and made the highest and best bid for said tract; that the same was struck off to him at his bid, to-wit, \$20 per acre, which was the price at which said land had been appraised by the state; that he thereafter tendered to the proper officers fifteen per cent of the purchase price of said tract and stands ready and willing to pay for the same and to do all things necessary as purchaser thereof, but the respondents have refused and still refuse to proceed further with the sale because, after the sale and before the tender, the state land officers discovered the fact that the tract in question lies within three miles of Square Butte; "that on May 4, 1915, Square Butte was an aggregation of dwelling-houses and stores located upon a branch line of the Chicago, Milwaukee & St. Paul Railway, between Lewistown and Great Falls, Montana, in section 3, township 20 north, range 12 east; that Square Butte consists of a railway station, postoffice, two general mercantile stores, one delivery barn, three grain elevators, one school, eight dwelling-houses, and ten small cabins or shacks, one hotel and saloon; that Square Butte is a platted town site, the plat of which has been duly filed in the office of the clerk and recorder of Chouteau county, Montana, and that it has a population of

seventy people, and that no proceedings have ever been had at any time for the incorporation of the said Square Butte.”

Accepting the foregoing as all of the facts essential to a determination of the question involved in this appeal, and keeping especially in mind those portions of the agreed statement which detail the number and kind of buildings in Square Butte and the population thereof; that Square Butte is a platted town site, and that the plat thereof is duly filed in the office of the clerk and recorder of Chouteau county, it becomes necessary, if the judgment of the lower court is to be sustained, (a) to delve into a labyrinth of uncertain definitions of the word “town” and (b) to consider the prevailing conditions and surrounding circumstances, the subject matter under consideration and the objects to be attained at the time of the adoption of sections 1 and 2 of Article XVII, as part of our state Constitution in 1889. Those sections read:

“Sec. 1. All lands of the state that have been, or that may hereafter be granted to the state by Congress, and all lands acquired by gift or grant or devise, from any person or corporation, shall be public lands of the state, and shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised; and none of such land, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, be ascertained in such manner as may be provided by law, be paid or safely secured to the state; nor shall any lands which the state holds by grant from the United States (in any case in which the manner of disposal and minimum price are so prescribed) be disposed of, except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States. Said lands shall be classified by the board of land commissioners, as follows: First, lands which are valuable only for grazing purposes. Second, those which are principally valuable for the timber that is on them. Third, agricultural lands.

Fourth, lands within the limits of any town or city or within three miles of such limits: Provided, that any of said lands may be re-classified whenever, by reason of increased facilities for irrigation or otherwise, they shall be subject to different classification.

“Sec. 2. * * * The lands of the fourth class shall be sold in alternate lots of not more than five acres each, and not more than one-half of any one tract of such lands shall be sold prior to the year one thousand nine hundred and ten (1910).”

(a) To arrive at a definite point in number of inhabitants or [1] number or character of business houses, or geographical limitations, when a community assumes the dignity of a town in its popular sense is quite impossible, and a review of various definitions by the lexicographers and text-writers, as well as decisions by the courts of last resort throughout the country, enlightens us but little, and discloses the fact to be that whether a certain community is to be classed as a town or not, as contemplated by Article XVII, section 1, of our Constitution, depends entirely upon its own surroundings, such as number of inhabitants, number of buildings, and character of business houses, whether located upon a regularly platted town site or not, and why it aspires to be promoted to the more exalted station in its growth.

No one would undertake to say that a motley collection of ten buildings, housing as many or more persons, and irrespective of whether such buildings were business houses or not, and irrespective of its regularity in geographical location, was under all circumstances a town, any more than would anyone deny that, in popular significance, at least, an aggregation of 600 houses furnishing shelter for an equal number of people, used for residences, mercantile stores, blacksmith-shops, saloons, warehouses, markets, a postoffice, and other business purposes, was a town, even though unincorporated. Certainly, it could not be successfully contended that a community qualified to meet the statutory requirements for incorporation would not be entitled to be dignified by the word “town.”

In *State ex rel. Powers v. Dale*, 47 Mont. 227, Ann. Cas. 1914D, 227, 131 Pac. 670, the court said: "The term 'town' has a general and popular, as well as a technical, meaning. In common parlance it has had an almost unvarying significance; derived from the Anglo-Saxon 'tun,' it originally meant 'a collection of houses inclosed by a hedge, wall, or palisade' (Century Dictionary); it still means 'any considerable collection of dwelling-houses, as distinguished from the adjacent country' (Standard Dictionary), or 'an aggregation of houses so near to one another that the inhabitants may fairly be said to dwell together' (38 Cyc. 596). * * * It is quite true that in both the Constitution and the Codes the term 'city or town' is used without any definite prefix, but under circumstances which make it clear that only incorporated cities or towns is meant; and a further investigation also discloses the frequent legislative use of the term 'city or town' without any definite prefix, but under circumstances which would render it absurd to hold that only incorporated cities and towns is meant. * * * It is not correct to say that, whenever an unincorporated town is meant, it has been explicitly so declared, or that the use of the term 'town' without the definite prefix, is in all cases intended to be an incorporated town." (See, also, *Millville Gas Light Co. v. Vine-land L. & P. Co.*, 72 N. J. Eq. 305, 310, 65 Atl. 504; *Ralls v. Parrish*, 105 Tex. 253, 147 S. W. 564.)

In popular use and acceptance the words "city," "town," and "village" present nothing obscure. "The word 'town' is more comprehensive than either of the others; it is a generic word, applicable as well to a city as to a village. In England a city was distinguished from other towns by the fact that it had a cathedral, and was the residence of a bishop, but in this country the name 'city' is used ordinarily to designate the larger classes of towns. The name 'village' always carries to the mind the idea of a small urban community. A city is a town, and a village is a town, but the word 'city' or 'village' indicates the size of the town." (*State ex rel. Scott v. Lichte*, 226 Mo. 273, 126 S. W. 466. See, also, *Territory ex rel. Kelly v. Stewart*,

1 Wash. 98, 8 L. R. A. 106, 23 Pac. 405; Rapalje & Lawrence Law Dictionary, 1282; 1 Blackstone, 114; 2 Bouvier Law Dictionary, 603.) The principal and essential idea conveyed "is that of oneness, community, locality, vicinity * * * a body of people collected or gathered together in one mass * * * and having a community of interest because residents of the same place." (*City of Denver v. Coulehan*, 20 Colo. 471, 27 L. R. A. 751, 39 Pac. 425; *Siskiyou L. & M. Co. v. Rostel*, 121 Cal. 511, 53 Pac. 1118.) In fact, the word "town" in its popular significance has been accepted by all the writers to mean substantially the same thing, although defined in different language, and when you have an aggregation of inhabitants and houses used for various purposes so near to one another that the inhabitants may fairly be said to dwell together, you have a town in the common acceptation of the word. Of course, the statutes of this state leave no uncertainty as to what a town is, viewed in the light of the statutes covering municipal incorporations, and for all purposes of statutory construction in that connection the matter is settled and requires no comment. (Rev. Codes, sec. 3208, and amendments, and sections 3202 and 3206.)

(b) But to say that Square Butte is a town as popularly defined, only brings us halfway to the conclusion sought upon this appeal. Did Article XVII, section 1, of our Constitution contemplate an "incorporated town," and, if not, what was intended by the use of the word "limits"? From what point would the three-mile limit be measured? Article XVII, section 1, of the Constitution must be construed in the light of conditions prevailing at the time of its enactment in 1889, and after observing the language used by the framers of our Constitution, the subject matter under consideration, and the object to be attained (*State v. Keeler*, 52 Mont. 205, 217, Ann. Cas. 1917E, 619, L. R. A. 1916E, 472, 156 Pac. 1080, citing *State ex rel. Jackson v. Kennie*, 24 Mont. 45, 60 Pac. 589; *State ex rel. Hillis v. Sullivan*, 48 Mont. 320, 325, 137 Pac. 392; *State ex rel. McGowan v. Sedgwick*, 46 Mont. 187, 127 Pac. 94; *Northern Pac. Ry. Co. v. Mjelde*, 48 Mont. 287, 137 Pac. 386), all of which

justify the conclusion that the framers of the Constitution did not intend "incorporated" towns when they used the word "town" without prefix in section 1 of Article XVII, but that undeniably they intended towns as popularly contemplated, and had in mind the then existing statutes covering the location of "town sites" when they used the word "limits."

At the time of the Constitutional Convention in 1889 the Congress of the United States had granted to the state of Montana portions of this great empire for the support, use and maintenance of our common schools. Discussion was had at that convention as to the manner of handling, using or disposing of such lands for the advantage and best interests of the schools, and to that end the debate covered the question whether the towns referred to should be "incorporated" or unincorporated; whether the distance from the limits of the town was to be one mile or six; whether the word "limits" sufficiently designated a point from which to measure distance if the town were unincorporated, and the object of extending the distance to more than one mile, *viz.*, to lessen the probability of sale until such time as the town near which the land was situated had had an opportunity to grow, and thereby enhance the value of said lands and secure more money to the state for the benefit of its common schools.

The matter came before the convention upon "propositions 34 and 35" offered for adoption as parts of the Constitution. Proposition 34 contained a classification identical with that found in section 1 of Article XVII above, except as to lands of the fourth class, and these, as stated in proposition 34, were "lands within the corporate limits of any incorporated town or city within a mile of such limits and which are worth more than \$50 per acre." According to the record of the convention proceedings (pages 2385 to 2387, 2391, 2428 to 2430, all inclusive), Mr. Myers, of Yellowstone, offered an amendment to strike from the language above quoted the word "incorporated" and the words "and which are worth more than \$50 per acre," stating that his objects were "to take the sense of the convention as

to whether they desire to retain the lands adjacent to incorporated cities only or incorporated towns," and "as to whether they desire to sell lands that are worth less than \$50 per acre." In the discussion which followed, as elsewhere in the debates of the convention, its attention was called to the fact that relatively few of the urban communities in Montana had been incorporated; and Mr. Collins, of Cascade, expressing favor toward Mr. Myers' amendment, said: "But I would like to see it go a little further. The one-mile limit is too near; it should be made five or six miles, because school lands, within six miles of any growing little town in Montana, or any city or incorporated town, are valuable." Other expressions were in similar vein, and in consequence the convention struck out the words "corporate" and "incorporated" in proposition 34, leaving the word "town" without any prefix, and extended the distance to three miles, seen in the present provision. And as we are amply authorized to examine the proceedings of the constitutional convention to assist in determining the intent of the convention and the understanding they had of the meaning of certain words and phrases (*State v. Camp Sing*, 18 Mont. 128, 142, 56 Am. St. Rep. 551, 32 L. R. A. 635, 44 Pac. 516; *Northern Pac. Ry. Co. v. Musselshell County*, ante, p. 96, 169 Pac. 53), it conclusively appears that all argument is now foreclosed as to the sense in which the word "town" was used, and whether incorporated or unincorporated towns were referred to and intended.

But lastly, conceding Square Butte to be a town, though [2] unincorporated, it yet could not meet the requirements of the Constitution without "limits." The agreed statement of facts discloses that: "Square Butte is a platted town site, the plat of which has been duly filed in the office of the clerk and recorder of Chouteau county." Upon page 2430 of the proceedings of the convention, *supra*, we find the attention of the convention called to the fact that there might be difficulty in defining the limits of an unincorporated town, whereupon Mr. Burleigh, of Custer county, observed that the "existing law" required the limits to be defined. The existing laws referred to were the

Compiled Statutes of 1887, sections 2011 to 2039, inclusive, and contained provisions for applications by the citizens of any town, whether incorporated or *unincorporated*, to create or own town sites; for surveying the land comprising the proposed town site and submitting plat and survey to the board of county commissioners; for laying off the town site into lots, blocks, streets and alleys, and filing plat thereof in the office of the clerk and recorder after acceptance by the board of county commissioners, *etc.* (Secs. 2011–2039, inclusive, Comp. Stats. 1887.)

So we must assume that when the convention adopted Article XVII, section 1, it did so with full knowledge of the existing laws covering platted town sites, and contemplated towns located upon town sites as the same were platted and filed in the office of the clerk and recorder, and that therefore the three-mile distance from the limits of the town would necessarily be measured from the nearest point shown upon the town-site plat.

From all of the foregoing it follows that Square Butte, located upon a platted town site, with its stores, elevators, school, post-office and residences, is, though unincorporated, a town within the meaning of Article XVII, section 1, of the Constitution of the state of Montana, so as to prevent the sale of a quarter-section of state land lying within three miles thereof; that there was no error as complained of by appellant; and that the judgment of the lower court should be affirmed. It is so ordered.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

COMO ORCHARD LAND CO., RESPONDENT, v. MARKHAM
ET AL., APPELLANTS.

(No. 3,874.)

(Submitted February 2, 1918. Decided February 25, 1918.)

[171 Pac. 274.]

Fraud—Vendor and Purchaser—Election of Remedies—Rescission—Complaint.

Pleading and Practice—Motion to Strike—Effect.

1. A motion to strike an allegation of the complaint having the effect of a demurrer, the allegation stricken will on appeal be deemed to be true.

Fraud—Election of Remedies.

2. A person injured by the fraudulent acts of another may elect to rescind, or may affirm the transaction and sue for damages.

[As to waiving the tort and suing for damages in *assumpsit*, see note in *Ann. Cas.* 1913D, 237.]

Rescission—Complaint—Contents.

3. To state a cause of action for rescission, plaintiff must allege that he has restored to the defendant everything of value which was received under the contract, or that he has offered to make restitution upon condition that defendant do likewise, unless it is made to appear that the latter is unable or positively refuses to do so.

Fraud—Expression of Opinion—When Fraud.

4. An expression of opinion concerning a material matter is actionable as fraudulent if the party making it possesses superior knowledge, such as would reasonably justify the conclusion that his opinion carries with it the implied assertion that he knows the facts which justify it, though he knows that he does not honestly entertain it, or if the opinion is so blended with facts that it amounts to a statement of facts.

Same—Representations—When Buyer may Rely upon.

5. A buyer of realty may rely upon the representations of the seller when the property sold is situated a long distance from the place where the sale is made and an investigation of the truth of the statements would entail great expense.

Same—Defense not Permissible.

6. A fraudulent seller cannot defend his actions on the ground of the buyer's credulity.

Same—Falsity of Representations—How Determined.

7. The falsity of representations as to land sold for fruit-raising purposes depended, not on whether the representations affected the quality of the land, but on whether they affected its value for the purposes for which bought.

As to effect of purchaser's concealment of misrepresentation of fact affecting the value of real estate, see note in 30 L. B. A. (n. s.) 748.

Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.

ACTION by the Como Orchard Land Company against Stuart H. Markham and another. From judgment for plaintiff, defendants appeal. Reversed and remanded.

Messrs. Walsh, Nolan & Scallon, for Appellants, submitted a brief; *Mr. C. B. Nolan* argued the cause orally.

While fully cognizant of the rules which are recognized in the case of fraudulent representations that when the means of obtaining knowledge are open to the complaining party, or where the representations have to do with future happenings, or where the representations may be characterized as trade talk, we insist that in this instance the representations complained of do not come under these headings, and that they are of such a character as to entitle the appellants to the relief which they demand. The allegations are that all of the statements of which complaint is made were false; they were known to be false, and they were made for the purpose of inducing the appellants to make a purchase of the property. (1 Bigelow on Fraud, 523; *Fargo Gas & Coke Co. v. Fargo G. & E. Co.*, 4 N. D. 219, 37 L. R. A. 593, 59 N. W. 1066; *Crawford v. Armacost*, 85 Wash. 622, 149 Pac. 31; *Jacobsen v. Whitely*, 138 Wis. 434, 120 N. W. 286; *Becker v. Clark*, 83 Wash. 37, 145 Pac. 65; *Koehler v. Dennison*, 72 Or. 362, 143 Pac. 649; *Power & Bro. v. Turner*, 37 Mont. 521, 97 Pac. 950; *Snively v. Meixsell*, 97 Ill. App. 365; *Williams v. Wilson*, 101 Ill. App. 541; *Krause v. Cook*, 144 Mich. 365, 108 N. W. 81; *Baker v. Crandall*, 7 Mo. App. 564; *May v. Loomis*, 140 N. C. 350, 52 S. E. 728; *American Cotton Co. v. Frank Heierman & Bro.*, 37 Tex. Civ. App. 312, 83 S. W. 845; *Davis v. Driscoll*, 22 Tex. Civ. App. 14, 54 S. W. 43; *Buena Vista Co. v. Billmyer*, 48 W. Va. 382, 37 S. E. 583; *Phillips v. Hebden*, 28 R. I. 1, 65 Atl. 266; *Mattauch v. Walsh Bros. & Miller*, 136 Iowa, 225, 113 N. W. 818; *Gurney v. Tenney*, 197 Mass. 457, 84 N. E. 428; *Hetland v. Bilstad*, 140 Iowa, 411, 118

N. W. 422; *Vincent v. Corbett*, 94 Miss. 46, 21 L. R. A. (n. s.) 85, 47 South. 641; *Olston v. Oregon Water Power & Ry. Co.*, 52 Or. 343, 20 L. R. A. (n. s.) 915, 96 Pac. 1095, 97 Pac. 538; *Henry v. Continental Bldg. & Loan Assn.*, 156 Cal. 667, 105 Pac. 960; *Kendrick v. Ryus*, 225 Mo. 150, 135 Am. St. Rep. 585, 123 S. W. 937; *Carr v. Sanger*, 138 App. Div. 32, 122 N. Y. Supp. 593; *Edward Barron Estate Co. v. Woodruff Co.*, 163 Cal. 561, 42 L. R. A. (n. s.) 125, 126 Pac. 351; *Beck v. Goar*, 180 Ind. 81, 100 N. E. 1; *Hubbard v. Oliver*, 173 Mich. 337, 139 N. W. 77; *Van Slochem v. Villard*, 154 App. Div. 161, 138 N. Y. Supp. 852.)

Messrs. O'Hara & Madeen, for Respondent, submitted a brief; *Mr. Robt. A. O'Hara* argued the cause orally.

A careful reading of the alleged false representations will disclose the fact that the statements made come under the head of "trade talk," vendors' opinions and visions of future profits, which, to say the least, any man, even though credulous and inexperienced, should have assayed at their proper value. (*Williams v. McFadden*, 23 Fla. 143, 11 Am. St. Rep. 345, 1 South. 618; *Dugan v. Cureton*, 1 Ark. 31, 31 Am. Dec. 727; *Gordon v. Parmelee*, 2 Allen (84 Mass.), 213; *Horton v. Lee*, 106 Wis. 439, 82 N. W. 360; *Brandt v. Krogh*, 14 Cal. App. 39, 111 Pac. 275; *Ott v. Pace*, 43 Mont. 82, 115 Pac. 37; *Lee v. McClelland*, 120 Cal. 147, 52 Pac. 300; *Rendell v. Scott*, 70 Cal. 514, 11 Pac. 779; *Bickel v. Munger*, 20 Cal. App. 633, 129 Pac. 958; *Ripy v. Cronan*, 131 Ky. 631, 21 L. R. A. (n. s.) 305, 307, 115 S. W. 791.)

It is not every so-called false statement made by the vendor that furnishes a cause of action, or which may be used as a defense. "Fraud without damage, furnishes no cause of action; nor is fraud without damage a defense." (*Holton v. Noble*, 83 Cal. 7, 23 Pac. 58; *Woodson v. Winchester*, 16 Cal. App. 472, 117 Pac. 565; *London & Lancashire F. Ins. Co. v. Liebes*, 105 Cal. 203, 38 Pac. 691; *Patterson v. Donner*, 48 Cal. 369; *Baker v. Brown*, 82 Cal. 64, 22 Pac. 879; *Morrison v. Lods*, 39 Cal. 381.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court. .

This suit was instituted to foreclose a mortgage given to secure an indebtedness of \$4,500. The defendants admit the execution of the notes and mortgage and, by way of affirmative defense or counterclaim, allege: That in May, 1909, they purchased from the plaintiff the lands described in the mortgage and that the indebtedness sued upon represents the unpaid balance of the purchase price; that the lands were sold by plaintiff and purchased by defendants for orchard purposes; that plaintiff agreed to plant the lands to orchards and cultivate them for five years; that defendants were residents of Wisconsin, without experience in fruit raising and without any knowledge of the lands except such knowledge as they gained from the information furnished by plaintiff; that, to induce the purchase, plaintiff represented to defendants (b) that the locality where the lands are situated was a long-tried fruit district, free from serious crop failures, damaging frosts, or harmful pests; (d) that fruits of hardy and semi-hardy varieties prosper in the locality as nowhere else in the United States; (e) that the demand for Montana grown fruits exceeded the supply and that there was a ready home market at remunerative prices; (g) that orchards operated by plaintiff in the vicinity had been successful, yielding large profits on the investments; (h) that apple growing has been very profitable in this vicinity, it being understood that these lands would be devoted principally to apple raising; and (k) that plaintiff had available expert knowledge of the business which would be applied to the end that proper selections of trees would be made and conditions injuriously affecting the industry avoided. It is alleged that all of these representations were false; were known to plaintiff to be false when made; that they were intended to be accepted as true and to be acted upon; that they were believed and acted upon by defendants to their damage, and that but for them the lands would not have been purchased; that defendants were lulled into a sense of security by subsequent statements of the same

character and did not discover that they had been imposed upon until within six months of the date this action was instituted.

Upon motion of plaintiff, the trial court struck out all the allegations of misrepresentation and, defendants declining to plead further, suffered judgment to be entered against them and appealed.

The motion to strike has the effect of a demurrer, and for the [1] purposes of this appeal all the allegations stricken are deemed to be true. Reduced to its lowest terms, the question presented is: Are these representations, or any of them, of such character as to furnish the basis for relief under the circumstances?

It is elementary that a person injured by the fraudulent acts [2] of another may elect to rescind or may affirm the transaction and sue for damages. (12 R. C. L., p. 405.) In order [3] to state a cause of action for rescission, it is necessary for the complaining party to allege that he has restored to the other party everything of value which was received under the contract, or that he has offered to make restitution upon condition that the offending party do likewise, unless it is made to appear that the latter is unable or positively refuses to do so. (Rev. Codes, sec. 5065; 18 Ency. Pl. & Pr. 829.) The counterclaim contains none of these necessary allegations and will not justify rescission.

Does it state a cause of action for damages? It does if the representations are material and it can be said that damages flow therefrom in the sequence of cause and effect.

Probably the most familiar example of fraud consists of telling a deliberate and intentional falsehood concerning a material matter. It is sometimes said that the expression of an opinion furnishes no ground for legal relief to one who relies upon it to his injury. Other authorities, however, modify this rule and limit the immunity to cases where the statement amounts to nothing more than an opinion and the parties have equal knowledge of the subject matter, or equal means of knowledge. (*Van Horn v. O'Connor*, 42 Wash. 513, 85 Pac. 260; *Aitken v. Bjerkvig*, 77 Or. 397, 150 Pac. 278.)

In *Butte Hardware Co. v. Knox*, 28 Mont. 111, 72 Pac. 301, this court said: "Mere expressions of opinion or of judgment do not, except in particular cases, which must be shown by the pleadings, constitute actionable fraud or false representations"; and this doctrine was approved in *Ott v. Pace*, 43 Mont. 82, 115 Pac. 37. But in neither case was any attempt made to amplify the subject or designate the circumstances under which the expression of an opinion might constitute fraud.

We think the following rule is sustained by reason and the [4] authorities: If the party expressing the opinion possesses superior knowledge, such as would reasonably justify the conclusion that his opinion carries with it the implied assertion that he knows the facts which justify it, his statement is actionable if he knows that he does not honestly entertain the opinion because it is contrary to the facts. (*Edward Barron Estate Co. v. Woodruff*, 163 Cal. 561, 42 L. R. A. (n. s.) 125, 126 Pac. 351). So, likewise, an opinion may be so blended with facts that it amounts to a statement of facts. (*Sheer v. Hoyt*, 13 Cal. App. 662, 110 Pac. 477.)

Authorities may be found which, by making a liberal allowance for the optimism of a seller, refuse to hold him legally responsible for "puffing his own wares" or engaging in so-called dealer's talk, even though his statements do not square with the truth, and this upon the theory that no sensible person ought to be influenced by such considerations; but even this rule, thus broadly stated, is not generally looked upon with favor at the present time. (*Prescott v. Brown*, 30 Okl. 428, 120 Pac. 991.) Of course, statements may be so extravagant that even the most credulous person ought not to believe them, and the law cannot undertake to reward mere folly. From the very nature of the subject there cannot be any definite rule by which to determine whether representations do or do not constitute fraud. The utmost that can be done is to judge the representations involved in the particular case, by the results which ought reasonably to be anticipated from a reliance upon them, by one whose situation is such that he may rightfully accept them as true.

If the complaining party examined the property—the subject matter of the transaction—or had the opportunity at hand to examine it, and failed without fault of his adversary, he cannot plead his own bad judgment in the one case, or his negligence in the other, as a foundation for legal liability. (*Power & Bro. v. Turner*, 37 Mont. 521, 97 Pac. 950.) But while the law does not reward the negligence or folly of a buyer, it does not require [5] him to pursue an independent investigation to ascertain the truth or falsity of the seller's representations when the property is situated a long distance from the place of the transaction and an investigation would entail great expense. (*Becker v. Clark*, 83 Wash. 37, 145 Pac. 65.) It is not alleged specifically that the sale of these lands took place in Wisconsin, but we think it is fairly inferable from the counterclaim, considered in its entirety. It was therefore a question for the jury whether, under the circumstances, the defendants were negligent in failing to investigate. It was also a question for the jury whether, under the advantageous position occupied by the plaintiff, its opinions were not so blended with alleged facts as to constitute them fraudulent representations within the rule above.

Some of these representations are very broad—even immoderate in the terms employed; but we do not think that it can be said, as a matter of law, that any one of them is so inherently improbable that defendants, as reasonably prudent persons, ought to have questioned its verity. It is rather an unsavory defense for plaintiff to say: "I made these representations to induce the sale, knowing they were false; but defendants were foolish not to suspect I was a knave." (*Jacobsen v. Whitely*, 138 Wis. 434, [6] 120 N. W. 286.) A fraudulent vendor cannot appeal to the law to extol his deceit and condemn the credulity of his victim.

It is no answer for plaintiff to make that these representations, if false, do not affect the quality of the lands. Defendants [7] had the right to select the purpose for which they would be devoted, and, since they were sold for orchard purposes, the question is: Do these representations, if false, affect the value of the lands for the purposes intended? It would

seem to follow as a natural consequence that these lands would be worth much less for fruit raising if the locality was subject to late frosts in the spring or early frosts in the fall, or if it was infected with harmful insect pests, or if hardy or semi-hardy varieties could not be made to prosper, or if the home market was already glutted with Montana grown fruits, or if other orchards in the vicinity had proved failures, or if plaintiff did not have expert knowledge of the business available for use in making proper selections of trees for planting or in the care of the orchards during the prebearing period. We have omitted reference to such other representations as we deem immaterial under the circumstances. For instance, it is alleged that plaintiff represented that there was available an ample supply of water for irrigation; but it is not alleged that these lands require irrigation.

The representations considered herein fall within the definition of fraud contained in section 4978, Revised Codes, and for this reason the court erred in striking them from the answer.

The judgment is reversed and the cause is remanded for further proceedings.

Reversed and remanded.

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

GLOVER, RESPONDENT, v. CHICAGO, MILWAUKEE & ST.
PAUL RY. CO. ET AL., APPELLANTS.

(No. 3,800.)

(Submitted January 28, 1918. Decided February 26, 1918.)

[171 Pac. 278.]

*Personal Injuries—Railroads—Master and Servant—Negligence
—Rules—Licensees—Guests—Res Ipsa Loquitur.*

Personal Injuries—What Plaintiff must Show.

1. One who seeks to recover for actionable negligence must show that the defendant was under a legal duty to protect him from the injury; that the defendant failed to perform that duty; and that the injury was proximately caused by the defendant's delinquency.

Same—Railroads—Master and Servant—Plaintiff Off Shift not Employee.

2. A railway telegraph operator, off shift, going neither to nor coming from work when riding on a gasoline speeder at the invitation of defendant company's roadmaster on his way to procure food supplies, choosing this mode of transportation in order to avoid paying the regular fare, was not then an employee of the company.

[As to distinction between licensee and invitee, see note in *Ann. Cas.* 1913C, 570.]

Same—Rules of Master—Customary Disregard—Knowledge.

3. If plaintiff had no knowledge of a rule of the railway company forbidding employees to ride on gasoline speeders, or the rule was more honored in its breach than its observance, its existence could not affect his right to recover.

Same—Licensees—Duty Owing to.

4. Since plaintiff was injured while riding on the roadmaster's gasoline speeder, on private business, and, aside from the roadmaster's invitation, had no warrant for so riding other than acquiescence implied from custom, he was a mere licensee, to whom the company owed no duty to keep its speeder in good condition or to operate it with caution.

Same—Duty Owing to Guest.

5. Assuming plaintiff to have been a guest of defendant railway company—one present on the gasoline speeder by invitation, implied as to the company and express as to the roadmaster—the duty owed him was to use reasonable care for his safety.

Same—Negligence—Evidence—Insufficiency.

6. Evidence *held* not to show that the breaking of a bolt on a gasoline speeder—the primary cause of the derailment—was due to any defect known, obvious or observable to defendants or to a failure to adequately inspect the car, and was therefore insufficient to fasten

As to injuries in performance of duty outside scope of original employment, see note in 48 *L. R. A.* 796.

As to scope of employment generally, see note in *L. R. A.* 1915E, 892.

On the question of applicability of rule *res ipsa loquitur* as between master and servant, see note in *L. R. A.* 1917E, 4.

liability upon them for breach of duty owing to plaintiff, as the railway company's guest, to use reasonable care for his safety.

Same—*Res Ipsa Loquitur*—When Inapplicable.

7. Where the happening of an accident is not necessarily inconsistent with ordinary care, the doctrine of *res ipsa loquitur* cannot apply.

Appeal from District Court, Missoula County; Theo. Lentz, Judge.

ACTION by William H. Glover against the Chicago, Milwaukee & St. Paul Railway Company and another. From a judgment for plaintiff, and an order denying them a new trial, defendants appeal. Reversed and remanded.

Mr. Henry C. Stiff, for Appellants, submitted a brief.

For the purpose of determining the question of the liability or nonliability of the company for his injuries, plaintiff was not an employee of the company, and his relation to the company was not different from what would have been that of a person who had never been in its employ. (*Myers v. Norfolk & W. R. Co.*, 162 N. C. 343, 48 L. R. A. (n. s.) 987, 78 S. E. 280; *Bennett v. Lehigh Valley R. Co.*, 197 Fed. 578; *Dodge v. Chicago Great Western R. Co.*, 164 Iowa, 627, 146 N. W. 14; *De Voe v. New York State Rys.*, 169 App. Div. 472, 155 N. Y. Supp. 12.)

Every person is presumed to know that a railway company does not carry passengers on hand-cars or gasoline speeders, which to a certain extent have taken the place of hand-cars, and that no employee in charge of such cars has the authority to create the relation of carrier and passenger between a railway company and any person whomsoever. This rule applies with special force to the plaintiff because of his occupation and the position held by him with the defendant company and the consequent opportunity he, for a long time, had of knowing the rules and practice in that regard. (*Chicago, B. & Q. Ry. Co. v. Casey*, 9 Ill. App. 632; *Burns v. Southern Ry. Co.*, 63 S. C. 46, 40 S. E. 1018; *Flower v. Pennsylvania R. Co.*, 69 Pa. 210, 8 Am. Rep. 251; *Sherman v. Hannibal & St. Joe Ry. Co.*, 72 Mo. 62, 37 Am. Rep. 423; *Whitehead v. St. Louis I. M. & S. Ry. Co.*,

22 Mo. App. 60; *Snyder v. Hannibal & St. Joe Ry. Co.*, 60 Mo. 413; *Dougherty v. Chicago, M. & St. P. Ry. Co.*, 137 Iowa, 257, 126 Am. St. Rep. 282, 14 L. R. A. (n. s.) 590, 114 N. W. 902; *Chrisco v. St. Louis & S. F. Ry. Co.*, 163 Mo. App. 540, 146 S. W. 1180.)

Mr. Harry H. Parsons, for Respondent, submitted a brief; *Mr. Edward Horsky*, of Counsel, argued the cause orally.

In this case it makes no difference whether the plaintiff be called an employee, a passenger or a licensee. In either capacity, as pleaded, the defendants owed him ordinary care. That he was a trespasser cannot be contended; he was an employee of defendant company, following a custom of riding on the gasoline car, at the invitation of the roadmaster, and on an errand to get supplies. No issue was ever raised or suggested that he was in any sense a trespasser. Nor was such ever suggested in the motion for nonsuit or defendant's offered instructions.

The roadmaster is the *alter ego* of the railway company. If he knew of or helped establish the custom, that is sufficient. (*Cleveland v. Pine Bluff etc. R. Co.*, 107 Ark. 93, 44 L. R. A. (n. s.) 687, 154 S. W. 191; *Thompson v. Chicago etc. R. Co.*, 18 Fed. 239, 5 McCrary, 542; *Lawrence v. Kaul Lumber Co.*, 171 Ala. 300, 55 South. 111.)

Whether Grimes was in the scope of his authority or not was for the jury. (*Barmore v. Vicksburg etc. R. Co.*, 85 Miss. 42, 63 Ann. Cas. 594, 70 L. R. A. 627, 38 South. 210; *Vicksburg S. & P. R. Co. v. Barmore*, 87 Miss. 273, 39 South. 1013; *Dalrymple v. Covey Motor Car Co.*, 66 Or. 533, 48 L. R. A. (n. s.) 424, 135 Pac. 91; *Penas v. Chicago etc. R. Co.*, 112 Minn. 203, 140 Am. St. Rep. 470, 30 L. R. A. (n. s.) 627, 127 N. W. 926; *Kwiechen v. Holmes & Hallowell Co.*, 106 Minn. 148, 19 L. R. A. (n. s.) 255, 118 N. W. 668; *Galveston, H. & S. A. Ry. Co. v. Currie*, 100 Tex. 136, 10 L. R. A. (n. s.) 367, 96 S. W. 1073; *Calley v. Lewis*, 7 Ala. App. 593, 61 South. 37; *Lawrence v. Kaul Lumber Co.*, 171 Ala. 300, 55 South. 111.)

On the question of custom and invitation, we invite attention to the following authorities: 6 Labatt, 2500, and note; *Lawrence v. Kaul Lumber Co.*, 171 Ala. 300, 55 South. 111; *Houston & T. C. R. Co. v. Bulger*, 35 Tex. Civ. App. 478, 80 S. W. 557; *Cogswell v. Rochester Mach. Screw Co.*, 39 App. Div. 223, 57 N. Y. Supp. 145; *Brennen v. Fair Haven etc. R. Co.*, 45 Conn. 284, 20 Am. Rep. 679; *Denison & S. R. Co. v. Carter*, 98 Tex. 196, 107 Am. St. Rep. 626, 82 S. W. 782; *The New World v. King*, 16 How. (U. S.) 469, 14 L. Ed. 1019.

Speeders, hand-cars and freight trains are all controlled, substantially, by the same law. (*Chicago etc. R. Co. v. Artery*, 137 U. S. 507, 34 L. Ed. 747, 11 Sup. Ct. Rep. 129; *Boyd v. Missouri Pac. R. Co.*, 236 Mo. 54, 139 S. W. 561; 249 Mo. 110, Ann. Cas. 1914D, 37, 155 S. W. 13; *McGrady v. Charlotte Harbor & N. R. Co.*, 66 Fla. 486, 52 L. R. A. (n. s.) 874, 63 South. 921; *Barmore v. Railway*, 85 Miss. 426, 3 Ann. Cas. 594, 70 L. R. A. 627, 38 South. 210; *Soderlund v. Chicago etc. R. Co.*, 102 Minn. 240, 13 L. R. A. (n. s.) 1193, 113 N. W. 449; *Moore v. Central Railway*, 47 Iowa, 688; *Salisbury v. Erie R. Co.*, 66 N. J. 233, 88 Am. St. Rep. 480, 55 L. R. A. 578, 50 Atl. 117; *Pool v. Chicago etc. Ry. Co.*, 53 Wis. 657, 11 N. W. 15; 56 Wis. 227, 14 N. W. 46; *Flynn v. Boston etc. Ry.*, 204 Mass. 141, 90 N. E. 521; *International & G. N. Ry. Co. v. Prince*, 77 Tex. 560, 19 Am. St. Rep. 795, 14 S. W. 171.)

Mr. Geo. W. Korte, Mr. Henry C. Stiff and Mr. Wm. L. Murphy, for Appellants, submitted a brief in reply to that of Respondent; *Mr. Korte* argued the cause orally.

It is an undoubted presumption of law that a person riding upon a hand-car or engine, a freight train, or any other carriage of a common carrier which is evidently not designed for the transportation of passengers, is not lawfully there, and if he is allowed to be there by the permission of the carrier's employees, the presumption is against the authority of the employees to bind the carrier by such act. (*Powers v. Boston etc. R. Co.*, 153 Mass. 188, 26 N. E. 446; *Eaton v. Delaware etc. R. Co.*, 57 N. Y.

382, 15 Am. Rep. 513; *Hoar v. Maine Cent. R. Co.*, 70 Me. 65, 35 Am. Rep. 299; *Gardner v. New Haven & Northampton Co.*, 51 Conn. 143, 50 Am. Rep. 12; *Graham v. Railway*, 23 U. C. C. P. 541; *Sheerman v. Railway*, 34 U. C. Q. B. 451; *Chicago & A. R. Co. v. Michie*, 83 Ill. 427.)

An invitation to ride on a freight train in contravention of the rules of the company, from an employee engaged in the operation of such train, will not render the company liable for a negligent injury to a person accepting such invitation, unless it is shown that the person extending such invitation was authorized by the company to do so. (*Pennsylvania Co. v. Coyer*, 163 Ind. 631, 72 N. E. 875; *Downey v. Chesapeake etc. Ry. Co.*, 28 W. Va. 732; *Ligo v. Newbold*, 24 Eng. L. & Eq. 507.) Unless there is a common interest or mutual advantage, an invitation cannot be inferred (*Chicago, I. & L. Ry. Co. v. Martin*, 31 Ind. App. 308, 65 N. E. 591), and a disregard or violation of its rules, or permission to ride upon cars, not designed therefor, from complacent or faithless servants, is not enough to show acquiescence or an habitual disregard of such rules and sanction thereof. (*Pennsylvania Co. v. Coyer*, 163 Ind. 631, 72 N. E. 875; *Snyder v. Hannibal & St. J. R. Co.*, 60 Mo. 413; *Powers v. Boston & M. R. Co.*, 153 Mass. 188, 26 N. E. 446.)

Where plaintiff knew that the car was not designed for the carrying of passengers, no presumption of authority to permit him to ride thereon can be inferred. (*Clark v. Colorado etc. R. Co.*, 165 Fed. 408, 19 L. R. A. (n. s.) 988, 91 C. C. A. 358.) So, too, in the case at bar, the plaintiff, an experienced railroad man, ought to be foreclosed from saying that, from the construction, nature and use of the speeder in question, Grimes had any authority to permit him to ride thereon for his personal convenience, and in no manner connected with the work of operating the defendant's railroad. The language used between the plaintiff and Grimes when it is claimed he was invited to "come on and ride" amounts to no more than a mere license, at most. (*Powers v. Boston & M. R. Co.*, *supra*; *Hoar v. Maine Cent. R. Co.*, 70 Me. 65, 35 Am. Rep. 299; *Bowler v. O'Connell*, 162

Mass. 319, 44 Am. St. Rep. 359, 27 L. R. A. 173, 38 N. E. 498; *Burns v. Southern Ry.*, 63 S. C. 46, 40 S. E. 1018.)

The cases cited by counsel in the brief in support of his claim that the roadmaster is the *alter ego* of the company, do not sustain his contention.

Some claim is made that Glover was an employee. How a man can be in one's employ when off duty is inconceivable. No such rule can be found in the books. (*Southern R. Co. v. Power Fuel Co.*, 152 Fed. 918, 12 L. R. A. (n. s.) 472, 82 C. C. A. 65; *Shearman & Redfield on Negligence*, 6th ed., 148; *Dodge v. Chicago Great Western R. Co.*, 164 Iowa, 627, 146 N. W. 14.)

MR. JUSTICE SANNER delivered the opinion of the court.

On June 18, 1914, the plaintiff (respondent here) was injured while riding upon a gasoline speeder driven by the defendant Grimes upon the defendant company's tracks between East Portal and Saltese, in this state. He claims the right to recover upon these allegations of his complaint: That he was at the time a telegraph operator employed by the defendant company at East Portal and was en route to Saltese for the purpose of obtaining groceries and other food supplies for himself; that the defendant Grimes was and still is a roadmaster of the railway company, whose authority as such extended over this and other portions of its line and who as such possessed and used said speeder; that the speeder was made to and did seat more than one person and was capable of running at a high and dangerous rate of speed; that after January 1, 1914 (at which time certain privileges of free transportation for foodstuffs theretofore extended by the company to its employees at East Portal were revoked), "it became and was the custom of the defendants to take or invite said employees at said place on said motor car and similar cars and convey and carry them to a station where said materials could be purchased and obtained, and elsewhere"; that on the day of the accident plaintiff boarded said speeder pursuant to such invitation; that unknown to him, but known, or by the exercise of due care knowable, to the de-

fendants, the speeder "was in a defective and dangerous condition, in that one of the iron bolts which had to do with holding and keeping in place one of the wheels thereof was loose, unconnected and wholly inadequate for said purpose, and at said time carelessly and negligently left and maintained in such condition"; that the defendants negligently failed to inspect the car or to warn the plaintiff of its defective condition; that with the car in such condition the defendants started with the plaintiff thereon downgrade from East Portal to Saltese, and "negligently and carelessly ran, operated and propelled said car at a high, rapid and dangerous rate of speed, so that, and by reason thereof, the said bolt so negligently and carelessly kept in said car came loose from said car, the rod holding said wheel in place by reason thereof came loose therefrom, and the said car, by reason thereof, while going at said careless and dangerous rate of speed, jumped the tracks * * * casting the plaintiff violently to the ground," inflicting the injuries referred to.

To this complaint demurrers and motions were addressed, and, these being overruled, separate answers were filed, the effect of which was to join issue and to plead that the derailment and plaintiff's injuries were due to his own misbehavior while riding said car.

The evidence adduced by the plaintiff tended to show the following: His journey to Saltese was to procure supplies for himself; it then was and for several months had been the custom for employees to be taken upon the speeders and motor cars of the company both ways from East Portal on private business of their own as well as upon company business—which custom was so open and notorious as to charge the defendants with knowledge thereof; on this particular occasion the plaintiff was personally invited by Grimes to go upon the speeder and did so to avoid paying the fare, amounting to twenty-five cents, upon the regular passenger train; they left a few minutes ahead of the passenger train which was scheduled to run over that stretch of track at not more than twenty-five miles an hour; the derail-

ment was caused by the distance rod between the wheels on one side of the speeder coming loose, due to the breaking of the bolt intended to keep the rod in place, and while the speeder, operated by Grimes, was traveling approximately thirty-five miles an hour.

The defendants, appealing from the judgment against them, as well as from an order denying their motion for new trial, insist that no actionable negligence is alleged in the complaint or established by the evidence. It is elementary, of course, that [1] one who seeks a recovery for actionable negligence must show: (1) That the defendant was under a legal duty to protect him from the injury; (2) that the defendant failed to perform the duty; and (3) that the injury was proximately caused by the defendant's delinquency. (*Ellinghouse v. Ajax Livestock Co.*, 51 Mont. 275, L. R. A. 1916D, 836, 152 Pac. 481; *Barry v. Badger*, ante, p. 224, 169 Pac. 34.) The plaintiff insists that he has met these requirements, although upon just what theory of duty neglected is not very clearly explained.

As to Grimes, the plaintiff was undoubtedly a guest; as to the company, his relationship must have been (a) employee, (b) passenger, (c) licensee, (d) guest, or (e) trespasser. That he was not an employee within any rule of obligation due to [2] him as such, or conversely, within any rule by which the company could be answerable for his acts, is perfectly clear. He was off shift, journeying neither to nor from his work, engaged upon his own private mission, actuated in his choice of ways to reach his destination by motives entirely personal. (*Ellinghouse v. Ajax Livestock Co.*, supra; 18 R. C. L., pp. 580-584, sec. 86 et seq.) No recovery, therefore, can be justified upon the theory of duty arising out of the relation of master and servant.

It is equally clear that he was not a trespasser. Suggestion [3] is made that the evidence on the part of the plaintiff shows a rule forbidding employees to ride upon the motor cars of the company; but whether this rule really existed at the time of the accident, or, if it existed, whether the plaintiff had knowledge

of it may well be doubted. If he had no knowledge of it, of course he could not be bound by it (*Pascoe v. Nelson*, 52 Mont. 405, 158 Pac. 317), and if it was more honored in the breach than in the observance—as the custom to the contrary would seem to indicate—it could not control in the face of that custom (*Alexander v. Great Northern Ry. Co.*, 51 Mont. 565, 577, 154 Pac. 914). Granting the custom, and that the plaintiff was on the speeder pursuant to it, recovery could not be defeated on the ground that the company owed him no duty save to refrain from wanton or willful injury.

Although the plaintiff testified to the view that he was a passenger, we think this too must be negatived. With regard to the use of its speeders by employees engaged in missions of their own, the attitude of the company was, at most, one of permission, not obligation. It was plainly not bound by any law or agreement to carry them in this way. Indeed, the plaintiff makes no claim that he had a *right* to be so carried, but he shows a very clear perception that the company was not obliged to carry him in any way except for hire, or pursuant to a pass applied for and furnished, upon the trains regularly provided for passenger service, one of which was shortly to arrive. The complaint is not framed, the case was not tried, the jury were not instructed upon the passenger theory, and therefore it must be eliminated as a tenable basis for the recovery in this case.

It is our present view that, as to the company, the status of [4] the plaintiff was that of a mere licensee. We think this follows from the fact that, aside from the invitation of Grimes, no warrant for using the speeder is shown, other than acquiescence implied from custom. If this be true, plaintiff accepted the conditions as he found them; the company owed him no duty to keep its speeder in good condition or to operate it with caution. (17 R. C. L. 594, sec. 98; *Martin v. Northern Pac. Ry. Co.*, 51 Mont. 31, 37, 38, 149 Pac. 89; Pollock on Torts, 10th ed., pp. 544–547.) Nor was Grimes vested with authority to create any higher relation. The plaintiff calls him an officer of the company and not an employee; but his duties were circum-

scribed, confined to maintenance of way; he was furnished with the speeder as he was with a pass and a freight permit to facilitate the performance of these duties; beyond this he had no authority and could no more create a relationship to the company, with its liabilities, through sharing the speeder than he could through sharing the permit or the pass.

Let it be assumed, however, that the plaintiff was something [5] more than a mere licensee—say a guest—one present by invitation, implied as to the company, express as to Grimes. Thus, both defendants stand or fall by the same test, to-wit, the duty to use reasonable care for the plaintiff's safety. (*Montague v. Hanson*, 38 Mont. 376, 383, 387, 99 Pac. 1063.) In what way was that duty breached under the pleadings and evidence here presented? The breach of duty alleged is that [6] the defendants suffered the car to get out of order and ran it at a rate of speed which was excessive and dangerous *in view of its condition*. In other words, the defective condition and the speed—not either alone—caused the derailment and the injury. This being true, it does not suffice to show that the speed was great, but it must appear that under conditions known, or with reasonable care knowable, to the defendants, the speed was dangerous; or, to put the matter in another form, we must determine that there was a negligent failure to know or correct the condition of the car. And here the evidence is altogether lacking as to either defendant. It is inferable from the evidence that the bolt above referred to broke and thus released the distance rod, causing the wheels to lose their proper distance or alignment. There is not a word to indicate that the break was due to any defect known, obvious or observable either to the company or to Grimes, and nothing to warrant the view that either the company or Grimes had failed to adequately inspect the car before its use. Apparently the plaintiff proceeded upon the theory that such a showing was unnecessary, although failure to inspect was alleged in the complaint; but, as the happening of the accident is not necessarily inconsistent with [7] ordinary care, *res ipsa loquitur* cannot apply. In this

respect, therefore—and this is the only respect in which the defendants could be held to answer—the case fails.

It is unnecessary to consider the other assignments of error, which in fact are not argued in appellants' brief. The judgment and order appealed from are reversed and the cause is remanded for retrial.

Reversed and remanded.

MR. JUSTICE HOLLOWAY concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

STATE, RESPONDENT, v. CATERNI, APPELLANT.

(No. 3,850.)

(Submitted January 29, 1918. Decided February 26, 1918.)

[171 Pac. 284.]

Criminal Law—Homicide—Murder in First Degree—Killing Wrong Person—Motion in Arrest—Evidence—Self-defense—Instructions.

Criminal Law—Motion in Arrest.

1. Under section 9353, Revised Codes, a motion in arrest lies only for the defects mentioned in section 9200, appearing on the face of the information, if not waived by failure to demur.

Same—Motion in Arrest—Evidence—Inadmissibility.

2. Resort to evidence extrinsic the information to show that it does not accurately state the facts is not permissible on motion in arrest.

Same—Murder in First Degree—Killing Wrong Person—Effect.

3. Since murder in the first degree is the taking of a human life with a deliberate and premeditated design to kill the person who was killed, a verdict finding defendant guilty of that degree was not warranted by evidence showing that deceased was accidentally killed by a shot fired by defendant but intended for another who was also killed by a second

On the question of assault with intent to murder or kill by unlawful act aimed at another than the one injured, see note in 37 L. R. A. (n. s.) 172.

On the question of homicide by unlawful act aimed at another than the one killed, see note in 63 L. R. A. 662.

shot but for the killing of whom defendant was not on trial; in such case the crime becomes murder in the second degree or manslaughter.

[As to necessity that motive be proved in prosecutions for murder, see note in *Ann. Cas.* 1912C, 236.]

Same—Self-defense—Instruction—When Inapplicable.

4. Under circumstances such as are adverted to in paragraph 3, *supra*, an instruction on the question of self-defense was inapplicable.

Same—Evidence—Quarrelsome Disposition of Deceased—*Res Gestae*.

5. Evidence that the person whom defendant intended to kill and subsequently killed was practically running amuck the evening of the homicide, armed with a stiletto, quarreling with and threatening other persons besides defendant, was admissible as part of the *res gestae*, as well as to show who was the aggressor and thus responsible for the killing of the person who lost his life accidentally.

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

JOHN CATERNI was convicted of murder, and appeals from the judgment and an order denying his motion for a new trial. Reversed and remanded.

Mr. Peter Breen and *Mr. A. C. McDaniel*, for Appellant, submitted a brief; *Mr. Breen* argued the cause orally.

Mr. J. B. Poindexter, Attorney General, and *Mr. C. S. Wagner*, Assistant Attorney General, for Respondent, submitted a brief; *Mr. R. L. Mitchell*, Assistant Attorney General, argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

John Caterni, convicted in the district court of Silver Bow county of murder in the first degree, seeks a reversal of the judgment against him and of an order denying his motion for new trial, upon several grounds, chief among them these:

1. That the information is insufficient to withstand the motion in arrest of judgment duly made and by the court denied. The motion as made covered a wide field, but its principal point is that the information charges the intentional killing of Rocchino Calvetti, whereas the evidence in the case shows that if Rocchino Calvetti was killed by Caterni, such killing was accidental and

unintentional, the shot being aimed at and intended for Severino [1] Calvetti. The contention is invalid. A motion in arrest lies only for certain defects appearing on the face of the indictment or information, not waived by failure to demur. (Secs. 9353, 9200, Rev. Codes.) There was no demurrer to this information, and whether it tells a true story or not, it is upon its [2] face clear, specific and sufficient. Resort to evidence extrinsic to it to show that it does not accurately state the facts is not permissible on motion in arrest. (*State v. Tully*, 31 Mont. 365, 371, 3 Ann. Cas. 824, 78 Pac. 760.)

2. That the verdict is not warranted by the evidence in this: It does not show the killing of Rocchino by Caterni, but does show that the shot which killed Rocchino, if it came from Caterni, was delivered by the latter in his necessary self-defense against Severino Calvetti, and was not intended for Rocchino, but for [3] Severino. Briefly stated, the situation as described by the record is that Rocchino was a child ten years old; as the result of an altercation in which Severino, Caterni and perhaps others, not including Rocchino, were engaged, Caterni, conceiving himself to be in danger of his life from Severino, shot twice at the latter, and it is claimed by the state that both shots took effect, one killing Severino and the other Rocchino. As to whether Rocchino was in fact shot by Caterni, and whether Caterni was acting in self-defense, the evidence is more or less conflicting, but the conflict must be taken as resolved against Caterni by the verdict of the jury. That he did not in fact desire or purpose to shoot or kill Rocchino must, however, be conceded, for all the evidence is to that effect. How, then, stands the verdict in this situation, remembering that the statute requires, as a constituent of murder in the first degree, a deliberate, premeditated design to kill (Rev. Codes, sec. 8292)? The general rule as stated in 13 R. C. L., at pages 745, 746, is that the slayer "is guilty or innocent exactly as though the fatal shot had caused the death of the person intended to be killed; the intent is transferred to the person whose death has been caused." But in this jurisdiction the law is settled otherwise. Section 21,

Chapter 4, Fourth Division, Compiled Statutes 1887, applied by this court in *Territory v. Rowand* (8 Mont.), is the same as our present section 8292, Revised Codes; and in that case four opinions were written which, though differing in other respects, do all agree that a charge of murder in the first degree against R. for the premeditated, intentional killing of B. was not sustained by evidence showing that B. was killed undesignedly in an effort by R. to accomplish the murder of M. (8 Mont. 110, 121, 19 Pac. 595; *Id.*, 8 Mont. 432, 438, 20 Pac. 688, 21 Pac. 19.) In such case the homicide is of course not a guiltless one, but it is not murder in the first degree because the specific intent required by the statute, the deliberate,, premeditated design specifically to kill the person who was killed or to kill him as one of a crowd, is lacking; and it becomes murder in the second degree or manslaughter, according to the circumstances. (See, also, *People v. Robinson*, 6 Utah, 101, 21 Pac. 403.)

3. That the district court misdirected the jury in its charge, especially in instructions 14, 16, 17 and 19. Instructions 14, 16 and 17 explicitly authorize the jury to convict of murder in the first degree. In view of what we have just said, these instructions were improper and, as the jury followed them, manifestly prejudicial. Instruction 19, offered by the state, undertook [4] to present the theory and limitations of self-defense; but it was ill adapted to this particular case because it required Caterni to be in fear from the deceased Rocchino. Caterni never claimed to be in fear of Rocchino; his claim—by which he was bound for good or ill—was that if he killed Rocchino, it was undesigned and in the course of self-defense against Severino. Other instructions make this apparent; there was no need for the confusion created by No. 19.

4. That the court erred in excluding evidence tending to show that Severino Calvetti was practically running amuck the entire [5] evening, armed with a stilleto, quarreling with and threatening other persons besides the accused. This was all *res gestae*; but independently of that, it was a proper subject of inquiry

which the accused was entitled to pursue within the limits of a reasonable liberality, as tending to support his claim of fear as well as to show who was the aggressor and thus responsible for the tragic end. (*State v. Whitworth*, 47 Mont. 424, 133 Pac. 364; *State v. Hanlon*, 38 Mont. 557, 100 Pac. 1035.) The theory of the exclusion seems to have been that upon the trial for killing Rocchino, the acts and conduct of Severino were irrelevant; but this ignores the right of Caterni to contend that Rocchino was killed undesignedly while Caterni was properly defending himself against Severino; yet Caterni was entitled to so contend and to be acquitted if his contention should be upheld, as the jury were told with more or less clarity in the instructions.

5. That the court erred in very many other rulings in the course of the trial, covered by eighty-five assignments. Some of these have merit, others not; and as we are confident that upon a retrial valid ground of complaint will not recur, we deem it unnecessary to further discuss them.

The judgment and order appealed from are reversed and the cause is remanded for new trial.

Reversed and remanded.

MR. JUSTICE HOLLOWAY concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

STATE EX REL. TOPLEY, RELATOR, v. DISTRICT COURT
ET AL., RESPONDENTS.

(No. 4,183.)

(Submitted February 18, 1918. Decided February 26, 1918.)

[171 Pac. 273.]

Supervisory Control—Appeal Adequate—Denial of Writ.

1. The writ of supervisory control will not issue to review a palpably erroneous order of the district court declining to set aside a default divorce decree, where the remedy by appeal is adequate and the time for taking it has not expired.

SUPERVISORY CONTROL by the State, on the relation of Mary J. Topley, against the District Court of the Fourth Judicial District in and for the County of Ravalli and R. Lee McCulloch, a Judge thereof, to review an order refusing to set aside a decree of divorce entered by default in the case of John W. Topley against relatrix. Dismissed.

Mr. S. J. Bischoff, for Relatrix, submitted a brief and argued the cause orally.

Mr. Geo. T. Baggs and *Mr. Harry H. Parsons*, for Respondents, submitted a brief; *Mr. Parsons* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Supervisory control to review an order of the district court of Ravalli county, refusing to set aside a decree of divorce entered by default. We state the facts substantially as conceded by respondents in their brief, to-wit: John W. Topley filed in said court his complaint for divorce against the relatrix, Mary J. Topley; he claimed residence in Montana, she being in New York; the complaint was weak and defective; the issuance of the *alias* summons was at least irregular; service or purported service was by publication and not personal; in due time the default of the relatrix was entered, and the decree rendered with-

out legal notice to her, actual or constructive; immediately upon learning of the facts she filed a motion to set aside the decree upon the grounds, mainly, that the court had no jurisdiction of the person of the relatrix or of the subject matter of the action, and that the decree was procured through fraud practiced upon the court; this was supported by numerous exhibits and affidavits, accompanied by a proposed answer sufficient on its face; the motion was heard, and on January 23, 1918, was overruled.

Just why on such a state of facts—ignoring the detailed [1] strength of relatrix's showing—the court refused to set aside the decree and open the default is to us incomprehensible. But the relatrix has an adequate remedy without resort to this most extraordinary of all legal proceedings. The order referred to is appealable; the time for appeal has not expired, and will not expire for yet a little while. No hardship peculiar to the case or different from that suffered by all appellants is presented, and the special interest in the state claimed as sufficient to warrant this interposition would justify a motion to advance. This proceeding will not lie unless there is no appeal or the remedy by appeal is inadequate (*In re Weston*, 28 Mont. 207, 72 Pac. 512; *State ex rel. Carroll v. District Court*, 50 Mont. 428, 147 Pac. 612); and we cannot permit it to be used as a convenience or shorter route to precedence over other causes equally entitled to our consideration.

For this reason the proceeding is dismissed at relatrix's cost.

Dismissed.

MR. JUSTICE HOLLOWAY concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

THRIFT, RESPONDENT, v. THRIFT, APPELLANT.

(No. 3,875.)

(Submitted February 2, 1918. Decided February 27, 1918.)

[171 Pac. 272.]

*Divorce—Alimony—Summons—Insufficient Service—Disposition of Property—Void Decree—Appeal and Error.**Divorce—Alimony—Summons—Service by Publication—Void Decree.*

1. A decree of divorce granting alimony in a sum certain, being *in personam*, cannot be rendered upon substituted service of summons alone.

Same—Disposition of Husband's Realty—Void Decree.

2. Where defendant in a divorce proceeding was a resident of another state, and service of summons was had by publication, no appearance being made by him before trial, and real property owned by him was not first brought under the control of the court by proper proceedings, it was without jurisdiction to transfer to the wife absolute title to it, in addition to awarding her alimony.

Same—Realty—Trust—What Does not Create.

3. Though separate funds of the wife suing for a divorce, may have been employed in the improvement of lands owned by the husband, a trust or interest in the property itself is not thereby created in her favor.

Same—Decree—Custody of Minor—When Ineffective.

4. A divorce decree has no extraterritorial effect, and is therefore a nullity in so far as it attempts to award the custody of a minor child, residing in another state, to plaintiff residing in Montana.

[As to extraterritorial effect of decrees for divorce, see notes in 83 Am. St. Rep. 616; 94 Am. St. Rep. 553.]

Appeal and Error—Court Bound by Record.

5. On appeal, the supreme court is bound by the record and may not decide the case presented upon statements in appellant's brief not borne out by the record.

Appeal from District Court, Chouteau County; John W. Tattan, Judge.

ACTION for divorce by Florence Thrift against Harmon Thrift. From an order denying defendant's motion to have eliminated from the decree certain provisions, he appeals. Reversed and remanded.

Messrs. Stranahan & Stranahan, for Appellant, submitted a brief; Mr. F. E. Stranahan argued the cause orally.

Mr. H. S. McGinley, for Respondent, submitted a brief.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Upon the trial of this case the district court granted a divorce in favor of the plaintiff, awarded her alimony in a specific sum, payable monthly, transferred to her absolutely certain real property belonging to the defendant, and gave to her the custody of a minor child, the issue of the marriage. The defendant and the child were residents of Indiana. Service of summons was made by publication, and there was no appearance by defendant before trial. Subsequently defendant appeared specially and moved to have eliminated from the decree the provisions for alimony, the transfer of the real estate, and the custody of the child. The motion was denied, and this appeal is from the order.

1. In so far as the decree awards alimony in a sum certain [1] it is *in personam* (14 Cyc. 745), and it is now settled beyond controversy that such a decree cannot be rendered upon substituted service alone. (*Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Silver Camp Min. Co. v. Dickert*, 31 Mont. 488, 3 Ann. Cas. 1000, 67 L. R. A. 940, 78 Pac. 967.)

2. The decree assumes to transfer to plaintiff absolutely 160 [2] acres of land belonging to defendant and acquired by him under the homestead laws of the United States, without having first brought the property under the control of the court by appropriate proceedings. If this property had been impounded, a judgment for alimony in a sum certain, even though rendered on substituted service, might have been satisfied out of the property, but not otherwise (*English v. Jenks, ante*, p. 295, 169 Pac. 727), or the property itself might have been set over to the use of the wife *for a limited period*, as authorized by section 3685, Revised Codes; but under no circumstances could the court transfer the title absolutely, and, having failed to subject the property to its control, the order affecting it is void. The fact [3] that the separate funds of the wife may have been employed in the improvement of these lands does not create a trust or interest in the property itself in her favor. (*Cizek v. Cizek* (on rehearing), 69 Neb. 797, 5 Ann. Cas. 464, and note, 96 N. W.

657, 99 N. W. 28.) Moreover, the court did not assume to transfer to plaintiff her own property, but the property of the husband.

3. The decree has no extraterritorial effect, and in so far as [4] it attempts to operate upon the status of the minor child residing in Indiana, it is a nullity. (*De La Montanya v. De La Montanya*, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345; Cooley's Constitutional Limitations, 7th ed., p. 584.)

In his brief, counsel for respondent asserts that defendant [5] and the child were residents of Montana, only temporarily absent, and that defendant has accepted the fruits of this decree and may not appeal from it. If these facts appeared in the record, different questions would be presented; but there is not even a suggestion of either. We are bound by the record, and may not decide these cases upon statements contained in the briefs.

The order is reversed and the cause is remanded, with directions to modify the decree in conformity with defendant's motion.

Remanded With Directions.

MR. JUSTICE SANNER concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

LINDEMAN, RESPONDENT, v. PINSON ET AL., APPELLANTS.

(No. 3,854.)

(Submitted January 9, 1918. Decided February 27, 1918.)

[171 Pac. 271.]

*Tax Deeds—City Lots—Sale en Masse—Invalidity—Real Property—Contracts of Sale—Deeds—Statute of Limitations.***Tax Deeds—City Lots—Sale en Masse—Invalidity.**

1. A tax deed showing on its face that a large number of lots situated in twenty-one different blocks, in an addition to a city, had been sold *en masse*, was void.

Real Property—"Good and Sufficient" Deed—What is not.

2. A contract to deliver a good and sufficient deed imports that the vendor will furnish a good title, and is breached where a vendor without title tenders a quitclaim deed sufficient in form.

[As to sufficiency of deed to satisfy a contract for execution and delivery of deed, see note in 11 *Am. Dec.* 34.]

Tax Deeds—Limitations—Statutes.

3. Chapter 50, Laws of 1909, providing that no action to annul tax deeds can be maintained unless commenced within two years after their issuance has reference to valid deeds, and is therefore inapplicable to such a tax deed which is void on its face.

Appeal from District Court, Powell County; George B. Winston, Judge.

ACTION by Linus Lindeman against John F. Pinson and Bertha Pinson. Judgment for plaintiff, and defendants appeal from it and an order denying them a new trial. Affirmed.

Cause submitted on briefs of counsel.

Mr. Thos. F. Shea, for Appellant.

In an action by a vendee for recovery of the purchase price upon alleged defects in a title, such vendee must specifically allege the defects upon which he relies and must prove the same by competent evidence. (*Miller v. Shelburn*, 15 N. D. 182, 107 N. W. 51; *Meyer v. Madreperla*, 68 N. J. L. 258, 96 Am. St. Rep. 536, 53 Atl. 477; *Blewitt v. Green*, 57 Tex. Civ. App. 588, 122 S. W. 914; *Heinemann v. Sullivan*, 57 Wash. 346, 106 Pac. 911; *Gammon v. Blaisdell*, 45 Kan. 221, 25 Pac. 580; *Ingalls v. Hahn*, 47 Hun (N. Y.), 104; *Hixson v. Hovey*, 18 Cal. App. 230, 122 Pac. 1097; *Kling v. A. H. Greef Realty Co.*, 166 Mo. App.

190, 148 S. W. 203; *Niscia v. Cohen*, 84 N. J. L. 351, 86 Atl. 395; 8 R. C. L., Deeds, sec. 191.)

As to the clause in the contract, requiring the vendees to furnish a good and sufficient deed: The earlier cases in California, to-wit, *Brown v. Covillaud*, 6 Cal. 566, 573, and *Green v. Covillaud*, 10 Cal. 317, 70 Am. Dec. 725, state the rule to be that the expression "good and sufficient deed" in a contract of sale for real estate imports only a covenant good in form and does not refer to the interest intended to be conveyed. Counsel is aware that later decisions have overruled the earlier California decisions to the extent that the use of the said expression does not mean that the deed shall be merely sufficient in form, but that it must also convey title. But under the circumstances accompanying the execution of the contract in question, it is clear that nothing more than a quitclaim deed was required of defendants. (*Porter v. Noyes*, 2 Greenl. (2 Me.) 22, 11 Am. Dec. 30, 37.)

Mr. W. E. Keeley and Mr. E. J. Cummins, for Respondent.

By "good and sufficient deed" is meant such a deed as will pass good title. It is true that a few of the earlier cases held that this phrase meant merely the character of the deed given and had no reference to the title. But even then, as now, the weight of authority was to the effect that this phrase meant such a deed as would pass good title, or at least one containing the usual covenants of warranty.

A vendor must give good title to the land, although the agreement calls for a "deed" merely, and does not stipulate for covenants of warranty. (*Bowen v. Vickers*, 2 N. J. Eq. 520, 35 Am. Dec. 516.) Where vendor is bound by his title bond to make the vendee "a good and perfect deed," he is bound to make and perfect title to it, and remove any existing encumbrances upon it, or protect the vendee against it. (*Greenwood v. Ligon*, 10 Smedes & M. (18 Miss.) 615, 48 Am. Dec. 775; *Carpenter v. Baily*, 17 Wend. (N. Y.) 244, 247; *Story v. Conger*, 36 N. Y. 673, 93 Am. Dec. 546; *Fleckten v. Spicer*, 63 Minn. 454, 65

N. W. 926.) The last case above is parallel to this one, and holds that under such an agreement good title must be passed. (See, also, *Burwell v. Jackson*, 9 N. Y. 535; note to *Porter v. Noyes*, 11 Am. Dec. 30, 36-39; *Moore v. Williams*, 115 N. Y. 586, 12 Am. St. Rep. 844, 5 L. R. A. 654, 22 N. E. 233; *Younie v. Walrod*, 104 Iowa, 475, 73 N. W. 1021; *Easton v. Montgomery*, 90 Cal. 307, 25 Am. St. Rep. 123, 27 Pac. 280; *Bash v. Cascade Min. Co.*, 29 Wash. 50, 69 Pac. 402, 70 Pac. 487; *Tindall v. Conover*, 21 N. J. L. (1 Zab.) 651, 654; *Everson v. Kirkland*, 4 Paige Ch. (N. Y.) 628, 638, 27 Am. Dec. 91; *Cogan v. Cook*, 22 Minn. 137.)

A quitclaim deed implies a doubtful title. A purchaser who acquires his title by a quitclaim deed cannot be regarded as a *bona fide* purchaser without notice, but takes only such title as the grantor can lawfully convey. (*McAdow v. Black*, 6 Mont. 601, 13 Pac. 377.) A quitclaim deed implies a doubtful title in the grantor, and it should not be held to pass anything more than such a title. (*Butte Hdw. Co. v. Frank*, 25 Mont. 344, 65 Pac. 1.) A purchaser under a quitclaim deed takes only such title as the grantor has and subject to any prior deed by the grantor to the same property. (*Wetzstein v. Largey*, 27 Mont. 212, 70 Pac. 717; *Gibson v. Morris State Bank*, 49 Mont. 60, 140 Pac. 76.)

HONORABLE JERE B. LESLIE, a Judge of the Eighth Judicial District, sitting in place of the Chief Justice, delivered the opinion of the court.

This action was brought by Linus Lindeman against John F. Pinson and Bertha Pinson, his wife, to recover damages for the breach of a contract entered into between the parties on the second day of November, 1912, whereby defendants agreed to sell and convey to the plaintiff lots 11 and 12, in block 7, Syndicate Addition to Deer Lodge, Montana, upon payment to them of the agreed purchase price. By the terms of the contract, which is set forth in full in plaintiff's second amended complaint, the plaintiff was obligated to pay \$10 cash upon the execution of the

agreement and \$165 in monthly installments of \$10 each, with annual interest upon the deferred payments until the purchase price should be paid. With respect to defendant's liability under the contract, after complete payment to them, it reads: "When the vendee has fulfilled all the conditions of this contract a good and sufficient deed shall be executed by the vendors, their heirs, executors or administrators, to the vendee, his heirs or assigns."

In view of the admissions of counsel for both parties at the trial, the cause was relieved of all questions of fact except as to the character of title held by the defendants to said lots, and it is unimportant to refer further to the pleadings. The cause was tried by the court sitting without a jury, resulting in a judgment for the plaintiff. Defendants have appealed from the judgment and from an order denying them a new trial.

It was admitted on the trial that the plaintiff had complied with all of the conditions imposed upon him by the terms of the contract, and, further, that before the institution of this action and again at the trial, the defendants tendered to the plaintiff a quitclaim deed to said lots sufficient in form as a quitclaim deed. Thereupon, for the purpose of showing the source of title in defendants to the lots in question, plaintiff introduced five separate deeds. The first a tax deed, dated March 31, 1894, from the county treasurer of Deer Lodge county, assuming to convey to Christian Schurch 247 lots in 21 different blocks in the Syndicate Addition to Deer Lodge, and including the lots in controversy. The next, a quitclaim deed dated May 5, 1894, from Christian Schurch and wife to T. E. Crutcher, conveying, among others, the said lots 11 and 12. Another, dated June 28, 1905, from Thomas E. Crutcher, quitclaiming said two lots to Edward Scharnikow. A bargain and sale deed dated December 12, 1908, conveying said lots from said Scharnikow and wife to L. C. Beattie, and, finally, a quitclaim deed dated December 3, 1912, from L. C. Beattie to J. F. Pinson.

The defendant J. F. Pinson and W. E. Keeley were sworn and testified as witnesses on behalf of defendants, but their tes-

timony throws no light upon the subject matter involved in this case. The above-noted admissions of the parties at the trial, the deeds above referred to, and the unimportant testimony of said Pinson and Keeley, constitute the sum of the testimony in the case, and the determination of the rights of the parties resolves itself into the solution of the question whether the tender of the quitclaim deed to the plaintiff was a sufficient compliance on the part of the defendants, with the terms of their contract.

The tax deed received in evidence in the case shows on its face that certain lots variously numbered, consisting of about [1] 247, and situated in 21 different blocks, ranging in their numbers from 1 to 151, in the Syndicate Addition to Deer Lodge, and embracing said lots 11 and 12 in block 7, were assessed all together, and that they were sold *en masse* for \$21, "being the whole amount of the taxes, interest and costs then due and remaining unpaid on said property." As was said in *North Real Estate, L. & T. Co. v. Billings, L. & T. Co.*, 36 Mont. 356, 367, 93 Pac. 40, 44: "We know, of course, that blocks in cities and towns are bounded by streets and alleys, and it therefore follows that the lots in these different blocks could not be adjoining lots. * * * Under the statute there is no doubt that a deed would not be invalid because it conveys a number of lots or parcels of land; but it is equally clear to us that, where a deed shows on its face that several noncontiguous parcels of property were sold *en masse*, the deed is void." In *Horsky v. McKennan*, 53 Mont. 50, 61, 162 Pac. 376, 379, a case bearing facts with respect to assessment, tax sale procedure and deed, similar to this case, it is said: "We entertain no doubt that such a sale as this deed discloses was in contravention of the law and a deed which shows it is void on its face"—citing the first above-named case and *Rush v. Lewis & Clark County*, 36 Mont. 566, 93 Pac. 943. A further discussion of the invalidity of the tax deed in this case is needless.

Schurch acquired no title to the lots herein involved, and the [2] defendants, claiming to derive title through that source, stand in no better situation. When they obligated themselves to execute "a good and sufficient deed" to their vendee, some-

thing more was contemplated by all of the parties than the execution and delivery of a quitclaim deed "sufficient in form" but barren of substance. A covenant to execute and deliver a good and sufficient deed imports that the vendor will furnish a good title to the land in question. A purchaser may bargain for a doubtful title, but he should not be held to have done so unless upon satisfactory evidence it appears that it was his intention so to do. The record in this case discloses nothing that militates against the conclusion that it was the intention of the parties, embodied in their contract, that the plaintiff should pay the agreed price for the lots, and when he did so that the defendants would execute to him a deed conveying to him a good title to the same. Many of the cases bearing upon this subject may be found in 39 Cyc. cited in support of the text, at pages 1442 and 1484-1486.

The quitclaim deed tendered to the plaintiff by the defendants was a nullity, and at best could have conveyed only such title as the grantors had at the time of its execution. (*Wetzstein v. Largey*, 27 Mont. 212, 70 Pac. 717.)

Counsel for appellants in his brief invokes the provisions of section 2654, Revised Codes, as amended by Chapter 50 of the [3] Session Laws of 1909. It has no force or effect as disclosed by the record in this case, and any discussion upon the subject with respect thereto is foreclosed by what was said in *Horsky v. McKennan*, at page 64 of 53 Mont., 162 Pac. 376, *supra*. This being an action for breach of contract, and the plaintiff having sustained by ample proof the burden of the alleged breach by the defendants, the other assignments are not deserving of further consideration.

No error appearing in the record, the judgment and order are affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

CASES DETERMINED
IN THE
SUPREME COURT

AT THE
MARCH TERM, 1918.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. SYDNEY SANNER,

THE HON. WILLIAM L. HOLLOWAY,

} **Associate Justices.**

STATE EX REL. HUBBERT, RELATOR, v. DISTRICT COURT
ET AL., RESPONDENTS.

(No. 4,190.)

(Submitted March 2, 1918. Decided March 7, 1918.)

[171 Pac. 784.]

***Supervisory Control—Receivers—Appeal—Adequate and Speedy
Remedy.***

Supervisory Control—Nature of Writ.

1. The writ of supervisory control issues to prevent a failure of justice, by supplying a means for the correction of manifest error committed by the trial court within jurisdiction, where there is no other adequate remedy and gross injustice is threatened.

Same—Receivers—Appeal Adequate Remedy.

2. Since under section 7099, Revised Codes, an order appointing a receiver is appealable, and such an appeal will present the question whether the district court committed error in denying a motion to annul the order of appointment, supervisory control does not lie to review the latter order.

Same—Receivers—Appeal Speedy Remedy.

3. Under the rules of the supreme court, an appeal from an order appointing a receiver is entitled to advancement; hence, the remedy by appeal is not only adequate (par. 2, above), but also speedy.

APPLICATION for Writ of Supervisory Control to review an order of the District Court of Hill County refusing to annul an order appointing a receiver. Proceedings dismissed.

Mr. Jos. P. Donnelly, for Relator, submitted a brief and argued the cause orally.

Mr. Henry C. Smith and *Mr. Thomas D. Long*, for Respondents, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In the case of *Masterson et al. v. Hubbert*, pending in the district court of Hill county, the trial court, at the instance of the plaintiffs and without notice to defendant, appointed a receiver to take charge of the property in controversy. The defendant moved the court to annul or abrogate the order appointing the receiver and, the motion being denied, applied to this court for a writ of supervisory control.

The remedy sought is an extraordinary one. The writ never [1] issues as a matter of course. It is authorized by the Constitution out of abundance of caution, to prevent a failure of justice by supplying a means for the correction of manifest error committed by the trial court within jurisdiction where there is no other adequate remedy and gross injustice is threatened. (*State ex rel. Carroll v. District Court*, 50 Mont. 428, 147 Pac. 612.) If the statute provides a remedy which will afford the same or equivalent relief, it must be pursued.

The motion to abrogate the order appointing the receiver was [2] made upon the records and files in the case. The only records in the case at that time were the complaint and order of appointment. By section 7099, Revised Codes, the order appointing the receiver is appealable and an appeal would present for consideration the entire record upon which the motion to abrogate was made, and therefore every question raised before the lower court or which may be raised on this application could

be raised on the appeal. If the order should be reversed on appeal, the effect would be to blot out the receivership as from the beginning. In other words, the appeal would accomplish the same result as would have been accomplished if the trial court had sustained defendant's motion and the same result as would now be accomplished if on this application we should direct the lower court to annul its order. The fact that a motion to annul the order of appointment was made and denied does not affect the right to appeal from the original order, and the time within which an appeal from such order may be taken [3] has not expired. It follows that in this instance the statutory remedy is adequate. It is also speedy, for under the rules of this court such appeal is entitled to advancement as of right.

For these reasons this application is denied and these proceedings are dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

IN RE THRESHER.

(No. 4,016.)

(Decided March 11, 1918.)

[172 Pac. 474.]

Attorneys—Conviction of Felony—Disbarment.

1. The name of an attorney convicted of a felony, will, under section 6410, Revised Codes, be stricken from the roll of attorneys, without formal charge or notice to him, upon lodgment of a certified copy of the record of conviction, after the judgment has become final either by reason of failure to appeal or for some other cause.

[As to causes and proceedings for disbarment of attorneys, and the power of courts to disbar, see notes in 95 Am. Dec. 333; 45 Am. St. Rep. 71.]

B. S. THRESHER, an attorney and counselor at law, convicted of grand larceny, ordered disbarred.

Opinion: PER CURIAM.

On February 27, 1917, in the district court of Wibaux county, B. S. Thresher, an attorney and counselor at law of this court, was convicted of the crime of grand larceny, and on March 1 was sentenced to undergo a term of imprisonment in the state prison for not less than one year nor more than one year and three days. On June 10 thereafter he was committed to prison [1] to serve his sentence. The clerk of the district court thereupon transmitted to the clerk of this court a certified copy of the record of conviction, as required by the statute (Rev. Codes, sec. 6409). Recognizing that a convicted defendant in any case has the absolute right to appeal to this court from a judgment until the expiration of one year from the date of its rendition or until the judgment has for some other cause become final, this court has heretofore refrained from taking the steps enjoined by the statute in such cases (Rev. Codes, sec. 6410), in order that no prejudice might be done to defendant. We are now informed by the attorney general that Mr. Thresher has served his term, has been released from prison, and hence further delay is not necessary. Therefore, on the authority of the cases of *In the Matter of the Disbarment of John Bloor*, 21 Mont. 49, 52 Pac. 779, and *In re Sutton*, 50 Mont. 88, Ann. Cas. 1917A, 1223, 145 Pac. 6, and without formal charge or notice to Mr. Thresher:

It is now ordered and adjudged that his name be stricken from the roll of attorneys and counselors of this court, and that he be precluded from practicing as such attorney and counselor in all the courts of this state.

IN RE WHITE.

(No. 4,151.)

(Decided March 11, 1918.)

[171 Pac. 759.]

*Attorneys—Practicing Without License—Contempt.***Attorneys—Practicing Law—What Constitutes.**

1. One who appears as an attorney of record in a cause pending in the district court, files papers in behalf of a party thereto, advertises himself as an attorney in newspapers, on letter-heads used by him in his correspondence, or by a sign displayed in front of his office, practices law in a court of record and is guilty of contempt of the supreme court if he does so without being first duly admitted to practice law in the state.

[As to practicing law without a license as contempt of court, see note in *Ann. Cas.* 1917B, 1200.]

Same—Limit of Power of District Judges.

2. A district judge is without authority to grant anyone the privilege of appearing in his court to represent a client, unless such person is duly admitted to practice law in the state or he is a nonresident and has been admitted in the highest court of the state in which he resides, and in the latter case only for the purpose of conducting a particular cause, and upon motion of a member of the bar of Montana, and not to practice generally for any length of time.

Same—Practicing Without License—What not Defense.

3. Since a district judge has no authority to permit one to practice law without having been admitted to the bar, such person cannot justify his violation of the law in this regard by alleging such permission as his excuse.

PROCEEDINGS in contempt against H. P. White for practicing law without having been first duly licensed. Respondent adjudged guilty.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On December 4, 1917, the attorney general of the state filed with the clerk of this court a petition reciting that H. P. White, the respondent, a resident of the town of Troy in Lincoln county, "is holding himself out as an attorney at law by advertisement and otherwise, and practicing the profession of an attorney and counselor at law in said town of Troy and county

of Lincoln, without first having been admitted to do so by this court," and asking that a citation issue under the seal of this court requiring the said White to appear and show cause why he should not be punished as for a contempt. The petition was supported by the affidavits of B. F. Maiden and Graham Fletcher, attorneys and counselors at law residing, respectively, at Libby and Troy in Lincoln county, the former being also the county attorney, and George E. Davis, a justice of the peace residing at Troy. In response to a citation directing him to appear and show cause why he should not be punished, the respondent filed an answer which denied certain of the material allegations in the affidavits, admitted others, and then pleaded in avoidance that before he appeared in the district court he had obtained permission to do so from Hon. T. A. Thompson, the presiding judge. The court thereupon appointed James M. Blackford, Esq., an attorney and counselor at law residing at Libby, to hear the evidence submitted and to report the same with his findings of fact to this court. This has been done, and the matter is now submitted for decision.

The referee found the charges contained in the petition and affidavits fully established by the evidence and reported: That during the year 1917 the respondent, not having been admitted [1] to practice law in the state of Montana or in any other state, appeared as an attorney of record in the district court of Lincoln county in two causes, numbered, respectively, 400 and 409, by filing papers therein in behalf of defendants; that during the same time he advertised himself as a lawyer in the local newspaper in Troy, on letter-heads used by him in his correspondence and by a sign displayed in front of his office which he maintained in the town of Troy; that he appeared in the district court on two different occasions, representing defendants in the causes mentioned but that, before doing so, he had obtained the permission of the presiding judge; that such permission had been granted by reason of the fact that the presiding judge assumed that the respondent had been regularly admitted to practice law in the state of Idaho and therefore might by

courtesy be granted the privilege to practice until he could be admitted by this court; and that thereafter the respondent also attempted to represent a defendant in a criminal cause entitled, "*The State of Montana v. Charles Dixon*," but that upon objection by county attorney B. F. Maiden, the presiding judge refused to permit him to appear for that purpose, and thereupon he refrained from any further appearance in the district court of that or any other county. The referee further found that the respondent did not by any direct misrepresentation mislead the presiding judge into the assumption that he had been admitted to practice in Idaho.

It cannot be questioned that in engaging in the activities he did, respondent was engaged in practicing law in the district court of Lincoln county (Laws 1917, Chap. 90, sec. 1; *In re Bailey*, 50 Mont. 365, Ann. Cas. 1917B, 1198, 146 Pac. 1101). Neither can it be questioned that in thus engaging in the practice he was guilty of contempt of this court. After full and careful consideration of the provisions of the statute on the subject, this was so decided in the *Bailey Case*, *supra*. We are entirely satisfied with the conclusion therein reached and will not enter upon an examination of the subject again.

The respondent assumes that the permission granted him by [2] Judge Thompson to practice until he should be regularly admitted by order of this court ought to absolve him entirely from the charge of contempt, and hence that he should not be subject to punishment. It is sufficient answer to this suggestion to call attention to the fact that a district judge is entirely without authority to grant anyone the privilege of appearing in the court over which he presides, to represent a client, unless he is a nonresident of this state and has been admitted to practice in the highest courts of the state in which he resides, and then only upon motion of a member of the bar of this state. Permission may be granted such an attorney to appear and conduct a particular case, but not to practice generally for any length of time (Laws 1911, p. 17, sec. 1). While, therefore, the error into which Judge Thompson fell in granting respondent

temporary permission to practice may be taken in palliation of the offense, it cannot be alleged as an excuse. It was [3] respondent's duty to ascertain what his rights were; especially so as he was assuming to act as an officer of the law and thus to possess the qualifications necessary to protect and enforce rights of such persons as would intrust him with them. As the judge had no authority to grant him the permission, respondent cannot justify his violation of the law (Rev. Codes, sec. 6388) by alleging it as his excuse.

In view of the circumstances, the court is not disposed to inflict a severe punishment upon the respondent, but it cannot acquit him entirely. It is therefore ordered and adjudged that he pay a fine of \$90.75, the amount of the costs of this proceeding, and that, in default of payment, he be committed to the jail of Lincoln county, to be confined therein one day for each two dollars of the fine.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

HILL ET AL., RESPONDENTS, v. COUNTY OF LEWIS AND CLARK, APPELLANT.

(No. 3,892.)

(Submitted February 26, 1918. Decided March 16, 1918.)

[171 Pac. 929.]

Taxation—Estates of Deceased Persons—Executors and Administrators—Concealed Property—Discovery—Validity of Assessment.

Taxation—Assessment to "Estate" of Decedent—Validity.

1. An assessment to the "estate" of a deceased person is tantamount to an assessment to his heirs, guardians of his heirs, executors of his will or administrators of his estate, as the case may be, if they have actual notice of it.

Same—Concealed Property—Assessment on Discovery—Validity.

2. Where, after the assessment-roll had passed out of the assessor's hands and the county board of equalization had adjourned, that officer discovered, listed for assessment, and assessed under the authority of

section 2542, Revised Codes, personal property belonging to the undistributed estate of a deceased person, the fact that the executors in charge of it were thus deprived of a right of appeal to the board of equalization did not invalidate the additional assessment, since the property was taxable, and appeal to the board is available, not to him who has concealed property, but who has delivered to the assessor a sworn statement of all his taxable property. (Sec. 2743.)

[As to liability of decedent's estate for taxes on property which escaped taxation in his lifetime, see note in *Ann. Cas.* 1913C, 1373.]

'Appeal from District Court, Lewis and Clark County; R. Lee Word, Judge.

ACTION by George H. Hill and others against the county of Lewis and Clark. Judgment for plaintiff and defendant appeals. Reversed.

Cause submitted on briefs of counsel.

Mr. J. B. Poindexter, Attorney General, and *Mr. W. H. Poorman*, Assistant Attorney General, for Appellant.

Mr. A. P. Heywood and *Mr. Ashburn K. Barbour*, for Respondents.

In the case at bar the assessment was made in the name of "S. T. Hauser Estate," and not to the heirs or executors, as required by law. In *Trowbridge v. Horan*, 78 N. Y. 439, the court held that an assessment made to "Estate of A B" was not made to an owner as required by statute. (See, also, Black on Tax Titles, 2d ed., sec. 108; *In re Kenworthy's Estate*, 63 Hun, 165, 17 N. Y. Supp. 655; *Fairfield v. Woodman*, 76 Me. 549; *L'Engle v. Wilson*, 21 Fla. 461; *Jackson v. King*, 82 Ala. 432, 3 South. 232; *Morrison v. McLauchlin*, 88 N. C. 251.) "A complaint in an action to recover delinquent taxes does not state facts sufficient to constitute a cause of action when it is alleged that the property was assessed 'as the estate of John Rains, deceased.' " (*People v. De Carrillo*, 35 Cal. 37; *Dresden v. Bridge*, 90 Me. 489, 38 Atl. 545; *Wood v. Torrey*, 97 Mass. 321; *Fowler v. Campbell*, 100 Mich. 398, 59 N. W. 185; *State ex rel. Stotts v. Kenrick*, 159 Mo. 631, 60 S. W. 1063; *Territory ex rel.*

Castillo v. Perea, 10 N. M. 362, 62 Pac. 1094; *Adams v. Board of Supervisors of Monroe County*, 154 N. Y. 619, 49 N. E. 141; *Fond du Lac v. Otto's Estate*, 113 Wis. 39, 90 Am. St. Rep. 830, 88 N. W. 917; *Morrill v. Lovett*, 95 Me. 165, 56 L. R. A. 634, 49 Atl. 666; *Scott v. Brown*, 106 Ala. 604, 17 South. 731; *Cromwell v. MacLean*, 123 N. Y. 474, 25 N. E. 932.)

The right to appear before the board of equalization is absolute (*Western Ranches v. Custer County*, 89 Fed. 577). "Without notice the board of equalization has no right to order the assessor to make a supplemental list." (*Stuart v. Palmer*, 74 N. Y. 183, 188, 30 Am. Rep. 289; *Common Council of Village of Three Rivers v. Smith*, 99 Mich. 507, 58 N. W. 481.)

No arbitrary power is given the assessor to divest the property owner of title to his property, but every form and requirement of the statutes must be strictly complied with. (*Re MacLean v. Jephson*, 123 N. Y. 142, 9 L. R. A. 493, 25 N. E. 409.)

It may be contended that equity demands the payment of the tax, but appellant cannot sustain the assessment upon that ground. (*City of Hannibal v. Bowman*, 98 Mo. App. 103, 71 S. W. 1122.)

MR. JUSTICE SANNER delivered the opinion of the court.

The respondents, as executors of the last will of S. T. Hauser, deceased, filed their complaint against the county of Lewis and Clark alleging: "That on the first Monday in March, 1915, there was embraced in the assets of and was owned by the said estate of Samuel T. Hauser, deceased, within the county of Lewis and Clark, certain real and personal property of the appraised value of \$19,055," which property was thereafter by said executors listed for assessment and was in due course assessed by the assessor of said county, taxed at \$420.27, and the taxes duly paid; that on December 8, 1915, "the said assessor of Lewis and Clark county claimed to have discovered certain other additional personal property as belonging to and being part of the assets of said estate of Samuel T. Hauser as omitted property," which he appraised at \$37,505 and added or attempted to add to

“the assessment aforesaid against the said estate”; that said change and addition were made by the assessor “long after the assessment-books of said county had passed from under his jurisdiction,” and without notice thereof to the respondents and without any opportunity given to them to contest or oppose the same before the board of equalization or elsewhere; “that the said personal property so entered upon said assessment-book as an addition to the assessment against said estate was a part and portion of the undistributed property of said estate of Samuel T. Hauser, deceased, and said assessment was made to or against said ‘S. T. Hauser Estate’ and not to the heirs, or the executors of said estate, as prescribed by law”; that the additional taxes thus and thereby imposed amounted to \$826.99, which the respondents paid under protest—wherefore judgment is demanded for the recovery of the sum so paid, with interest and costs.

To this complaint the county of Lewis and Clark interposed a general demurrer, which was overruled, and the county, declining to plead further, suffered the judgment from which this appeal is taken.

The propositions submitted by the respondents as explanatory [1] of the judgment and as ample to sustain it are: (1) That the assessment is void because made to “S. T. Hauser Estate,” and (2) that the assessment is void because made by the assessor long after the assessment-roll had passed out of his hands and long after the board of equalization had adjourned. In support of these propositions are cited thirty-four decisions, three of which are by this court and one by the federal court for this district; the remainder are from other jurisdictions. In an abstract way they furnish such support; but in truth none of them is a precedent for this case. The Montana decisions which involve raises without notice were in suits to recover taxes paid under protest, and are thus the only citations procedurally in point (*Western Ranches v. Custer County*, 28 Mont. 278, 72 Pac. 659; *Matador Land & Cattle Co. v. Custer County*, 28 Mont. 286, 72 Pac. 662; *Western Ranches v. Custer County*, 89 Fed.

577) ; and it is notable that in all of them great care was taken to allege and prove that the party aggrieved did not own the property so additionally listed or that it was not of the value placed upon it, and therefore the taxes sought to be recovered were not justly or lawfully collectible.

According to this complaint, the property originally assessed was "embraced in," that is to say, was not all, the assets of the Hauser estate taxable in Lewis and Clark county ; the property which the assessor "claimed" to discover was discoverable because it was in fact "a part of the undistributed property of said estate," and there is no suggestion that it was not taxable as such ; this property the executors had not listed, though it was their duty to do so ; no complaint is made of the amount levied ; the executors took cognizance of the assessment and paid the tax ; they do not claim that any injustice was done to them or their trust, and no wrong is charged save the naked procedural defects above asserted. That such a case differs materially from those cited to support it—wherein the taxing power sought to enforce rights based upon void assessments, or sales of the property to pay void taxes were threatened, or tax titles to property based on void assessments were involved, or statutory proceedings were had before payment to annul assessments, or unjust and excessive assessments without notice were presented—is perfectly clear ; and the question is whether such a case presents a right to the return of moneys honestly payable merely because of defects in the mode by which payment was induced.

1. As we understand the purpose of section 2522, Revised Codes, it is : to assure that notice to some interested person shall be given of the charge for taxes upon property still in course of administration, and to provide that payment, when made by heirs, guardians, executors or administrators, as the case may be, shall bind all the parties in interest, in proportion to their interest. The statute is by its terms permissive and directory, rather than mandatory, and in this respect it differs from sections 2510 and 2517, Revised Codes, applied in *Birney v. War-*

ren, 28 Mont. 64, 72 Pac. 293; hence an assessment made otherwise than as directed by section 2522 would not of itself be notice and would be voidable if, as a consequence, the party sought to be charged had no notice of it. But to adopt the rigid construction here urged would be to void an assessment to administrators if as a matter of fact the estate was in charge of executors, and would convert the section from a statute to aid, into a statute to defeat, the raising of public revenue. Of course, no such construction as this was intended by the legislature; on the contrary, and notwithstanding the cases cited from other jurisdiction, we think an assessment to the "estate of A" is tantamount to an assessment to the heirs, guardians of heirs, executors of the will, or administrators of the estate of A, as the case may be, if they have actual notice of it. So it eventuates here that respondents' first proposition would have value if it appeared that because of the assessment to "S. T. Hauser Estate," no notice of it had come to any of the persons to whom in technical precision the property should have been assessed and thus it had become delinquent, subject to penalty and threatened with sale. Such, however, is not the situation. The respondents as executors, persons in control of the juridical entity called the S. T. Hauser Estate, took cognizance of the assessment and paid the tax, and if, as the complaint itself shows, the property assessed was in fact "undistributed property of the estate of S. T. Hauser, deceased," if it was subject to taxation in the amount imposed, it seems a refinement to say that the county, justly entitled to the money, must now refund it merely because of a misprision that hardly amounts to a misnomer.

2. The same considerations make for avoidance of respondents' second proposition. The authority for the assessment [2] asserted by the appellant is section 2542, Revised Codes, to-wit: "Any property discovered by the assessor to have escaped assessment may be assessed at any time, if such property is in the ownership or under the control of the same person who owned or controlled it at the time it should have been assessed."

Let it be assumed for present purposes that this section does not mean what it says; that the assessor is powerless to do anything after the roll comes into the hands of the treasurer, and that if one is clever enough to conceal his taxable property until that event, he may escape taxation upon it and thrust the burden which he ought to bear, upon the shoulders of others; the facts nevertheless remain that according to the complaint this property was taxable; it stood charged with that debt to the county, and the executors could have properly paid it without any formal assessment; had they done so, neither they nor their trust would have suffered any actionable wrong. If this be true, what is the actionable wrong in the present instance? Certainly not that the respondents have fairly met a just demand. The asserted wrong is that this just demand, fairly met, was not properly formulated, its collection was not preceded by certain modal requirements designed to benefit persons who might be injured by the absence of them. But the absence of them was of no consequence to these respondents or to their trust, because there was nothing for them "to contest or oppose before the board of equalization or elsewhere." That under these circumstances the tax was not illegal so as to authorize a recovery in this kind of an action may be gathered from the very sections invoked to sustain it. (Rev. Codes, secs. 2742, 2743, as amended Chap. 135, Session Laws, 1909.) The provision found in section 2743, that "if the assessment * * * has been added to or changed either by the assessor or by the county board of equalization, and such person has not been notified thereof and given an opportunity to contest the same before the county board of equalization, the tax of such increased value or added property shall * * * be adjudged by the court to be void," is, by its terms, available only to the "person who has delivered to the assessor a sworn statement of his property subject to taxation" with "the estimated value" thereof. This means all of his taxable property, according to his best knowledge and belief, and the fact that, notwithstanding such list, the assessor or board may increase the value or add other property implies that

an honest controversy must exist between the public and the taxpayer as to what property should have been taxed or what value should have been placed upon it.

The judgment is reversed and the cause remanded, with directions to sustain the demurrer.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied April 5, 1918.

TIETJEN, RESPONDENT, v. HEBERLEIN, APPELLANT.

(No. 3,873.)

(Submitted March 7, 1918. Decided March 19, 1918.)

[171 Pac. 928.]

*Statute of Limitations—Actions—Voluntary Discontinuance—
New Action—Burden of Proof.*

Actions—Obligation not Founded on Writing—Statute of Limitations.

1. An action by an executor to recover from a beneficiary under a will a succession tax required by the laws of another country which plaintiff had paid was upon an obligation not founded on an instrument in writing, and therefore barred by subdivision 3 of section 6447, Revised Codes, because not commenced within three years from the time the tax was paid.

Same—Voluntary Discontinuance—New Action.

2. The provision of section 6464, Revised Codes, under which a plaintiff may, after the period of the statute of limitations has run in an action, commence a new one for the same cause as that alleged in the first, if the first was terminated in any other manner than by voluntary discontinuance, *held* to apply to every case wherein there has been a failure to reach a determination of the merits without plaintiff's fault and the period of limitations becomes complete during the pendency of the action.

Same—Voluntary Discontinuance of Prior Action—New Action—Burden of Proof.

3. A plaintiff who seeks to avail himself of the benefit of the provision of section 6464, Revised Codes, and bring a new action for the same cause once sued upon by him, but which suit was discontinued and against which the statute of limitations has run, must show affirmatively that the discontinuance of the prior action was

not voluntary on his part, the fact that it was dismissed "without prejudice" being without significance.

[As to commencement of action as interrupting statute of limitations in favor of intervener, see note in *Ann. Cas.* 1916B, 316.]

Appeals from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by August Tietjen against Lena Heberlein. From a judgment for plaintiff and an order denying her a new trial, defendant appeals. Reversed.

Messrs. Wight & Pew, for Appellant, submitted a brief; *Mr. Chas. E. Pew* argued the cause orally.

Mr. O. W. McConnell, for Respondent, submitted a brief.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to recover the amount of a succession tax required by the laws of British Columbia. Plaintiff is one of the executors of the last will of William Tietjen, deceased, and the residuary legatee under the will. Defendant is also a beneficiary under the will. Plaintiff alleges that on June 6, 1911, he paid the succession tax as he was required by law to do; that the payment was made for the use and benefit of defendant, and that no part of the tax has been repaid. This action was commenced on July 22, 1914. Among other defenses interposed was the plea of the bar of the statute of limitations. Plaintiff prevailed in the lower court and defendant appealed from the judgment and from an order denying her a new trial.

Discussion of the character of this action is foreclosed by the [1] decision in *Schaeffer v. Miller*, 41 Mont. 417, 137 Am. St. Rep. 746, 109 Pac. 970. (See, also, 9 Cyc. 243; 27 Cyc. 833.) The action is upon an obligation not founded upon an instrument in writing, and since it was not commenced within three years from the time the tax was paid, it is barred by subdivision

3, section 6447, Revised Codes, unless some proceeding intervened to toll the statute.

To avoid the defense of the statute of limitations, plaintiff [2] alleged in his reply that in June, 1913, he commenced an action against the defendant to recover upon this same cause of action; that on June 16, 1914, he "dismissed his action without prejudice and thereafter on the 22d day of July, 1914, filed his complaint in this case."

Section 6464, Revised Codes, provides: "If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal without awarding a new trial, or the action is terminated *in any other manner than by voluntary discontinuance*, * * * the plaintiff may commence a new action for the same cause after the expiration of the time so limited and within one year after such reversal or termination." A provision of this character is in the nature of an exception to the general statute of limitations, and is intended to apply to every case wherein an action has been commenced and without plaintiff's fault there has been a failure to reach a determination of the merits and the period of limitations becomes complete during the pendency of such action. (*Coffin v. Cottle*, 16 Pick. (33 Mass.) 383; 25 Cyc. 1314.) Since plaintiff seeks to [3] avail himself of the benefit conferred by this statute, it is incumbent upon him to disclose affirmatively that the discontinuance of the prior action was not voluntary. The word "voluntary" is here employed in the ordinary sense of the term, and means: proceeding from the will; produced in or by an act of choice; free; without compulsion. (Webster's International Dictionary.) The use of the terms "without prejudice" is not significant in this connection. The dismissal of the prior action was voluntary or it was not.

The allegation of the reply is that plaintiff dismissed the prior action. The minute entry of the court is: "In this cause, on motion of counsel for plaintiff, the court this day ordered that the above-entitled action be dismissed without prejudice." Neither the allegation of the reply nor the minute entry is sus-

ceptible of two constructions. The dismissal was effected at the instance and request of plaintiff and amounted to a voluntary discontinuance.

Since this action was not commenced within three years after the tax was paid, it was barred by the provisions of section 6447.

The judgment and order are reversed and the cause is remanded to the district court, with directions to enter judgment dismissing the complaint and for defendant's costs.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

CHEALEY, RESPONDENT, v. PURDY ET AL., APPELLANTS.

(No. 3,876.)

(Submitted March 7, 1918. Decided March 21, 1918.)

[171 Pac. 926.]

Contracts — Pleading and Proof — Variance—Complaint—General Denials — Evidence — Hearsay Testimony — Harmless Error.

Oral Contract—Complaint—Contents.

1. The plaintiff in an action on a contract resting in parol must allege the contract upon which he seeks to recover, a substantial performance of it according to its terms, a breach by the defendant, and the facts showing the amount he is entitled to recover.

Same—General Denials—Evidence Admissible.

2. Under a general denial in an action on an oral contract, defendant may introduce any evidence which tends to show that he did not enter into the contract, or that he made a contract different in one or more substantial particulars from that alleged, or that the plaintiff has failed to fulfill the obligations assumed by him therein according to its terms, or any other fact which tends to destroy, not to avoid, the cause of action alleged.

Same—Hearsay Testimony—When Harmless Error.

3. Where defendants alleged in their counterclaim in an action on a contract, and admitted on the stand, that they were copartners, admission of hearsay testimony to the same effect was harmless.

Same—Variance—What Does not Constitute.

4. A variance amounting to a failure of proof did not arise where the complaint alleged a joint contract with four defendants and the evidence disclosed a contract with only two of them.

Appeals from District Court, Hill County, in the Twelfth Judicial District; Wm. A. Clark, a Judge of the Fifth District, presiding.

ACTION by W. T. Chealey against B. D. Purdy and others. Judgment for plaintiff, and defendants appeal from it and an order denying them a new trial. Affirmed.

Mr. H. S. Kline and Mr. C. B. Elwell, for Appellants, submitted a brief; *Mr. Elwell* argued the cause orally.

Section 500 of the New York Code of Civil Procedure is practically the same as our Code regarding answers, and has been construed to allow evidence, under a general denial, that would show that the contract actually entered into was not as alleged in the complaint. (*Miller v. Insurance Co.*, 1 Abb. N. C. (N. Y.) 470; *Hellmuth v. Benoist*, 144 Mo. App. 695, 129 S. W. 257; *Sorenson v. Townsend*, 77 Neb. 499, 109 N. W. 749; *Fudge v. Marquell*, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895; *West End Mfg. Co. v. P. R. Warren Co.*, 198 Mass. 320, 84 N. E. 488; *Multnomah County v. Willamette Towing Co.*, 49 Or. 204, 89 Pac. 389; *Brown v. Wisner*, 51 Wash. 509, 99 Pac. 581; *Goodwin v. Biddy* (Tex. Civ.), 149 S. W. 739; *Anderson Mercantile Co. v. Anderson*, 22 N. D. 441, 134 N. W. 36.)

Messrs. Nelson & Turcotte, for Respondent, submitted a brief.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought against four defendants—B. D., E. L., W. W. and Edythe Purdy—as copartners under the firm name of Purdy Bros., to recover of them the value of work done and material furnished by plaintiff in drilling a well for them under an oral contract. The complaint alleges that the plaintiff agreed on his part to drill the well at a place designated by defendants upon their land or that of some one of them, for the purpose of obtaining water. It then alleges the terms of the contract, how

and when payment was to be made, and that the plaintiff has fully performed the contract according to its terms, except in so far as he was prevented from doing so by the act of the defendants. It demands judgment for \$591.50, less the sum of \$21.49, which defendants have paid. The record does not disclose whether the defendants W. W. and Edythe Purdy interposed any defense or whether the action was discontinued as to them. They are not in anywise interested in these appeals. The defendants B. D. and E. L. Purdy joined in an answer which, besides specifically denying the existence of the partnership, denies generally all the allegations of the complaint "except as hereinafter specifically admitted, modified, qualified or denied," and then interposed a counterclaim for \$186.36 for services, team hire, *etc.*, performed and furnished to plaintiff by them as copartners. Upon this counterclaim plaintiff joined issue by reply. The trial resulted in a verdict and judgment for plaintiff in the sum of \$503.11 and costs. Defendants have appealed from the judgment and an order denying their motion for a new trial.

1. The first contention made is that the court erred to the [1, 2] prejudice of defendants in ruling that it was not competent for them, under their general denial, to show as a defense that the contract as made by the parties was different in substantial particulars from that alleged in the complaint, and in excluding evidence offered for that purpose. They have presented an elaborate argument, with a citation of numerous authorities, to maintain their position. Technically, the denial as made is not a general denial. (*O'Donnell v. City of Butte*, 44 Mont. 97, 119 Pac. 281.) Since, however, counsel assume that it is, for the purposes of these appeals we accept their assumption as correct. As an abstract proposition there can be no doubt, either on principle or authority, of the soundness of the rule invoked by counsel. Whatever may be the nature of the cause of action upon which a plaintiff seeks to recover, he must allege in his complaint facts disclosing the presence of all the elements necessary to make it out. (Rev. Codes, sec. 6532;

Ellinghouse v. Ajax Livestock Co., 51 Mont. 275, L. R. A. 1916D, 836, 152 Pac. 481.) The answer may be a general denial (Rev. Codes, sec. 6540), the effect of which is to put in issue every material allegation constituting the cause of action alleged, and thus to cast upon the plaintiff the burden of establishing by his evidence, *prima facie* at least, the presence of every element of it, and hence his right to recover. If at the close of his evidence he has failed to do this, there is a total failure of proof and he is properly nonsuited. It logically follows that under his general denial the defendant may introduce any evidence which tends to controvert any fact material to plaintiff's case, and if he is successful in overcoming the *prima facie* case disclosed by plaintiff's evidence, as a whole, or in any particular, or in establishing an equipoise in the proof, he is entitled to a verdict. (1 Ency. Pl. & Pr. 817; *De Sandro v. Missoula L. & W. Co.*, 48 Mont. 226, 136 Pac. 711; *Stephens v. Conley*, 48 Mont. 352, Ann. Cas. 1915D, 958, 138 Pac. 189.) These rules apply to all actions, whatever their nature, for the provisions of the Codes on the subject of pleadings cited *supra*, furnish the exclusive guide as to what pleadings are required or are permitted in this jurisdiction. As applied to an action on a contract resting in parol, the plaintiff must allege the contract upon which he seeks to recover, a substantial performance of it according to its terms, a breach by the defendant, and the facts showing the amount he is entitled to recover. A general denial by defendant puts in issue all of these allegations. The burden is then cast upon the plaintiff to establish all of them by substantial evidence. If, for instance, he fails to establish the contract alleged, he fails to make out a cause of action (*Kalispell Liquor & Tobacco Co. v. McGovern*, 33 Mont. 394, 84 Pac. 709), and the defendant is entitled to a nonsuit. So the defendant, under his general denial, may introduce any evidence which tends to show that he did not enter into the contract, or that he made a contract different in one or more substantial particulars from that alleged, or that the plaintiff has failed to fulfill the obligations assumed by him therein accord-

ing to its terms, or any other fact which tends to destroy, not to avoid, the cause of action alleged.

The authorities cited by counsel fully sustain their contention; but they have no application to any ruling made by the court during the trial in this case. Counsel offered no evidence which tended in any way to show that the contract differed in any of its terms from those alleged. Of the several rulings of which they complain, a brief notice of two will be sufficient to show that none of them involved the principle contended for by counsel. Martin Lyden, a witness who had been employed by plaintiff, described somewhat in detail the construction of the well, the measurements of it, the depth to which the water rose in it after it was finished, the kind of casing installed in it, *etc.* After stating in substance, in reply to questions put to him on cross-examination, that he knew nothing of the terms of the contract, he was asked: "Didn't you tell Miss Purdy the day before you came over to put the casing in the well, or the night before, or some few days after the drill-bit was lost, these words: That it was not a good well, that Chealey was going to claim it was, and that he was a hard man to run up against?" Upon objection by counsel for plaintiff that the question called for evidence that was incompetent and immaterial under any issue made by the pleadings, the witness was not permitted to answer. On direct examination, the defendant B. D. Purdy was asked: "Have you or your brothers or sisters used this well at any time?" The witness was not permitted to answer. There was no prejudice. Neither an affirmative nor a negative answer to either of these questions would have had any value as proof that the contract contained any stipulation other than those alleged in the complaint.

2. The plaintiff testified that he had first had a conversation [3] about drilling the well with B. D. and E. L. Purdy, and had afterward made the contract with B. D. Purdy. He was then permitted to testify over the objection of counsel: "They said they were acting for all of them [defendants]; they were digging it together." Counsel now contend that this was error

on the ground that the evidence was hearsay. The ruling was erroneous (*Nyhart v. Pennington*, 20 Mont. 158, 50 Pac. 413), but could not have prejudiced these defendants. It was alleged by them in their counterclaim that they were copartners. Both admitted in their testimony that they were. The other two defendants who alone could allege prejudice are not parties to these appeals.

3. The last contention is that the evidence is insufficient to sustain the verdict. The argument is that since the complaint [4] alleges a contract with all four of the Purdys, proof of a contract with B. D. and E. L. Purdy only was such a variance between the allegations of the complaint and the proof that the verdict cannot be sustained. The contention is without merit. It is true, as counsel say, a recovery cannot be sustained against any of several defendants when the contract proven differs substantially from that alleged (*Kalispell Liquor & Tobacco Co. v. McGovern, supra*); but the fact that a complaint in an action on a contract alleges a joint contract with several defendants and the evidence discloses a separate contract with some of them is not a variance amounting to a failure of proof within the meaning of section 6587, Revised Codes. (*Logan v. Billings & Northern R. Co.*, 40 Mont. 467, 107 Pac. 415; Rev. Codes, secs. 6711, 6712.)

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

Rehearing denied April 13, 1918.

BUNTIN, ADMINISTRATOR, APPELLANT, v. CHICAGO, MILWAUKEE & ST. PAUL RY. CO. ET AL., RESPONDENTS.

(No. 3,888.)

(Submitted March 11, 1918. Decided March 25, 1918.)

[172 Pac. 330.]

Parties—Secreting Witnesses of Adversary—Contempt—Misdemeanor—New Trial.

1. The action of a party in secreting and forcibly keeping in hiding a witness of his adversary until the trial was concluded, and thus suppressing material testimony, constituted contempt, a misdemeanor and misconduct or irregularity for which a new trial should be granted.

[As to attempt to deceive the court as contempt, see note in *Ann. Cas.* 1912B, 1310.]

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

ACTION by C. W. Buntin, as administrator of the estate of John Zuke, deceased, against the Chicago, Milwaukee & St. Paul Railway Company and James Hopkins. Judgment for defendants. Plaintiff appeals from an order denying him a new trial. Reversed.

Mr. E. K. Cheadle and *Mr. B. K. Wheeler*, for Appellant, submitted a brief; *Mr. Cheadle* argued the cause orally.

Mr. Chas. J. Marshall, for Respondents, submitted a brief, and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Defendants having secured a favorable verdict upon the trial of this case, plaintiff moved for a new trial, specifying as one ground of his motion irregularities in the proceedings of the defendants by which plaintiff was prevented from having a fair trial. The motion was overruled and plaintiff appealed from the order.

In support of the motion certain affidavits were presented, among them the affidavit of Walter Weide, which, after setting forth the facts within his knowledge concerning plaintiff's cause of action, states that he came to Lewistown on December 17, 1914 (the day before the trial), and on that evening talked with counsel for plaintiff concerning the facts to which he could testify, and promised them to be present in court on the morning following at 9:30; that before that hour defendant Hopkins, an agent of the defendant railway company, and a third party unknown to him, secreted him in a room in a downtown office building and compelled him to stay in hiding until the trial was concluded. The other affidavits present material matters but they need not be considered here. There were no counter-affidavits filed and the facts disclosed stand admitted.

The action of these parties in thus suppressing material testimony constituted contempt (sec. 7309 (8), Rev. Codes), a misdemeanor (sec. 8249, Rev. Codes), and misconduct or irregularity for which a new trial should have been granted (sec. 6794 (1), Rev. Codes; 29 Cyc. 774).

While this court has no means of ascertaining the extent of the wrong done to plaintiff in this instance, we are not disposed to enter upon a critical analysis of the subject. The character of the offense committed is so odious and so utterly at war with every intelligent notion of the due administration of justice that the prevailing parties will not be permitted to profit by such wrongdoing. (*Barron v. Jackson*, 40 N. H. 365; *Carey v. King*, 5 Ga. 75.)

The order is reversed and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

CHICAGO, MILWAUKEE & ST. PAUL RY. CO., RESPONDENT,
v. POLAND, COUNTY TREASURER, ET AL., APPELLANTS.

(No. 3,882.)

(Submitted March 8, 1918. Decided March 25, 1918.)

[172 Pac. 541.]

*Cities and Towns—Special Street Improvements—Railway
Right of Way—Easement in Streets—Assessment—Sale for
Nonpayment.*

Special Street Improvements—Railway Right of Way—Assessment—
Mode of Payment.

1. An easement in a city street in favor of a railway company for right of way purposes in crossing it is not susceptible of assessment for a special improvement, where the basis adopted for apportioning the cost thereof is front footage; nor is the tract itself assessable under such plan, since under it the lot or parcel of land bordering or abutting on the street on which the improvement was made must bear the cost proportionately, and a street cannot border or abut upon itself.

[As to assessment of railroad right of way for street improvement, see note in *Ann. Cas.* 1916E, 579.]

Same—Railway Right of Way—Assessment—Sale.

2. A tract in a city street used for a right of way by a railway is not property owned or controlled by the company, but is owned by the public and controlled by the city exclusively, and is therefore not assessable for special improvements or subject to sale for the purpose of paying for the improvement upon failure of the company to pay.

*Appeal from District Court, Fergus County; Roy E. Ayers,
Judge.*

ACTION by the Chicago, Milwaukee & St. Paul Railway Company against Rufus G. Poland, treasurer of Fergus county, and the City of Lewistown. From a judgment for plaintiff, defendants appeal. Affirmed.

Mr. J. B. Kirkland, for Appellants, submitted a brief.

Under the plain wording of the provisions of Chapter 89 of the Laws of 1913, there can be no doubt that the railway right

of way in question, owned as an easement only, is "included within the street improved," and is a lot, land or piece or parcel of land, and hence is properly owned or controlled by the railway company; and the fact that it is a mere easement, and not owned in fee, does not relieve it from assessment. Wisconsin, Michigan, Pennsylvania, Missouri, Connecticut, Iowa and Washington, and one or two other states seem to hold that a railroad right of way cannot be assessed for local improvements. Various reasons are given for the rule laid down by the courts in said states; but, in the main, the opinions of the courts are based upon the proposition that a railroad right of way owned as an easement only is not a lot, land or piece or parcel of land. Where the courts have held that a railroad easement is not subject to assessment for a local improvement, it has been a case where the Code provisions of the state would bear no other construction. The supreme courts of New Jersey, Kentucky, Illinois, Ohio and California are among the principal courts which have held that, under the statutes of their respective states, such rights of way of railroads are assessable for local improvements, and in not one of these states referred to is the legislative intention in this regard made as clear as it is by Chapter 89 of the Laws of 1913. (*Los Angeles Pacific Co. v. Hubbard*, 17 Cal. App. 646, 121 Pac. 306; *Chicago & Northwestern Ry. Co. v. Village of Elmhurst*, 165 Ill. 148, 46 N. E. 437; *City of New Haven v. Fair Haven & Westfield R. Co.*, 38 Conn. 422, 9 Am. Rep. 399; *Louisville & N. R. Co. v. R. B. Park & Co.*, 117 Ky. 779, 79 S. W. 206, 80 S. W. 1108, 81 S. W. 251; *Shreveport v. Prescott*, 51 La. 1895, 46 L. R. A. (n. s.) 193, 26 South. 664; *Edwards Hotel & City R. Co. v. City of Jackson*, 96 Miss. 547, 51 South. 802; *Heman Construction Co. v. Wabash R. Co.*, 206 Mo. 172, 121 Am. St. Rep. 649, 12 Ann. Cas. 630, 12 L. R. A. (n. s.) 112, 104 S. W. 67; *State v. City of Passaic*, 54 N. J. L. 340, 23 Atl. 945; *Troy & Lansingburgh R. Co. v. Kane*, 9 Hun (N. Y.), 506; *Chatham County Commrs. v. Seaboard Airline Ry. Co.*, 133 N. C. 216, 45 S. E. 566; *Northern Pacific R. Co. v.*

Richland County, 28 N. D. 172, Ann. Cas. 1916E, 574, L. R. A. 1915A, 129, 148 N. W. 545; *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159, 160; *Oklahoma City v. Shields*, 26 Okl. 265, 100 Pac. 559; 1 Page & Jones on Taxation by Assessment, secs. 597, 598, 601, 620, 630; 5 McQuillin on Municipal Corporations, sec. 2050.)

The weight of authority is to the effect that a fragmentary portion of a railroad right of way, whether owned in fee or as an easement, is subject to sale for the assessment levied against it, where such power of sale is specifically given by statute. (1 Page & Jones on Taxation by Assessment, sec. 1078; *Northern Pacific Ry. Co. v. Richland County*, *supra*; *Heman Construction Co. v. Wabash R. Co.*, *supra*; *Los Angeles Pacific Co. v. Hubbard*, *supra*; *Illinois Central Ry. Co. v. Commissioners*, 129 Ill. 417, 21 N. E. 925.)

Even though this court should hold such right of sale, though expressly given by statute and not forbidden by the Constitution, against public policy, nevertheless, the fact that the proceeding provided by the legislature for the enforcement of the lien is not available, will not invalidate the assessment; but the court will provide an appropriate remedy for the collection of the assessment. (*City of Kalispell v. School District No. 5*, 45 Mont. 221, Ann. Cas. 1913D, 1101, 122 Pac. 742; *Pittsburg etc. Co. v. Fish*, 158 Ind. 525, 63 N. E. 454; *Commissioners of Franklin County v. City of Ottawa*, 49 Kan. 747, 33 Am. St. Rep. 396, 31 Pac. 788.)

Mr. Rudolf von Tobel, for Respondent, submitted a brief and argued the cause orally.

The assessment against which this action is directed is not uniform and equal as between the different property owners in the special improvement district. (*Billings Sugar Co. v. Fish*, 40 Mont. 256, 278, 20 Ann. Cas. 264, 106 Pac. 565, quotes with approval from *Releigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330,

14 S. E. 521; *People v. Lynch*, 51 Cal. 15, 20, 21 Am. Rep. 677; Hamilton's Law of Special Assessments, sec. 594.)

The assessment in the case at bar is unequal and not uniform in this: It is levied upon all of the private property fronting on Main street, including six lots belonging to respondent, and in addition to said lots the assessment is levied against the tract of land lying wholly within Main street. In other words, respondent is assessed upon all of its Main street lots, the same as every other property owner in the district, and in addition is asked to pay the sum of \$520.39 assessed against a portion of the street itself.

Upon the question of benefits derived it is not contended that respondent's Main street lots, namely, its station grounds, are not benefited equally with other lots along the street, but it is maintained that there is no special benefit warranting any further assessment such as is made against that portion of the street over which its tracks extend. (*McMillan v. Butte*, 30 Mont. 220, 76 Pac. 203; *Power v. Helena*, 43 Mont. 336, 36 L. R. A. (n. s.) 139, 116 Pac. 415.) While the courts are inclined to accept the judgment of the legislature as to what property is benefited, nevertheless there must be some real, tangible benefit to the property from the improvement to sustain the assessment. (*Butte v. School Dist. No. 1*, 29 Mont. 336, 74 Pac. 869; *City of Bridgeport v. New York & N. H. R. Co.*, 36 Conn. 255, 4 Am. Rep. 63; *New York & N. H. R. R. Co. v. City of New Haven*, 42 Conn. 279, 19 Am. Rep. 534; *New Jersey R. & T. Co. v. City of Elizabeth*, 37 N. J. L. 330; *Northern Pac. R. R. Co. v. City of Seattle*, 46 Wash. 674, 123 Am. St. Rep. 955, 12 L. R. A. (n. s.) 121, 91 Pac. 244; *City of Owensboro v. Sweeney*, 129 Ky. 607, 130 Am. St. Rep. 477, 18 L. R. A. (n. s.) 181, 111 S. W. 364; *Norwood v. Baker*, 172 U. S. 269, 43 L. Ed. 443; *City of Hartford v. West Middle District*, 45 Conn. 462, 29 Am. Rep. 687.)

"A city charter, authorizing the assessment of lands 'abutting' on a street for improvements thereof, does not apply to a

railroad right of way which lies wholly within the street.” (*Indianapolis & V. Ry. Co. v. Capitol Pav. & Const. Co.*, 24 Ind. App. 114, 54 N. E. 1076; *South Park Commrs. v. Chicago B. & Q. R. R. Co.*, 107 Ill. 105, 108; *Holt v. City of East St. Louis*, 150 Ill. 530, 37 N. E. 927.)

While there is a hopeless conflict in the authorities as to the right to assess, there is much less conflict as to the right to sell a portion of the right of way in enforcement of the levy. In the case of *Detroit G. H. & M. Ry. Co. v. Grand Rapids*, 106 Mich. 13, 58 Am. St. Rep. 466, 28 L. R. A. 793, 63 N. W. 1007, it is held that a right of way cannot be either assessed or sold. (See, also, *Philadelphia v. Philadelphia W. & B. R. Co.*, 33 Pa. St. 41, 43.) The annotator of *Heman Construction Co. v. Wabash R. Co.*, 12 L. R. A. (n. s.) 112, in the note to that case, says: “Of the few cases that deal with the question, whether the right of way may be sold to satisfy a lien for local assessments, nearly all deny the right to make such sale.”

MR. JUSTICE SANNER delivered the opinion of the court.

Appeal from a judgment enjoining the sale of certain property for a delinquent special improvement district assessment. The material facts are: That under the authority of Chapter 89, Session Laws 1913, the city of Lewistown created special improvement district No. 9 for the purpose of paving Main street to where it intersects Miller street and the Chicago, Milwaukee & St. Paul Railway crossing at that point; the exterior boundaries of the district include such intersection and they mark the end of the paving in that direction; the basis adopted for apportioning the cost of the improvement was front footage and the respondent declined to pay the assessment levied against the property here involved; that property is in and is a portion of Main street, but it is impressed with an easement in favor of the respondent, for railway right of way, and the question presented is whether this tract is subject to the sale herein pro-

posed. The situation is shown by the following sketch, the tract A-B-C-D being the bone of contention:

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A noticeable feature of the case is that the subject of the proposed sale is the tract A-B-C-D itself—not the easement or right of way enjoyed by the respondent; and the respondent contends—as the district court held—that the sale is not permissible because (a) neither the tract itself nor the respondent's interest therein borders or abuts upon the street; (b) the property assessed and sought to be sold is not owned or controlled by the respondent; (c) the continuous service of a railroad is of such paramount public importance that a portion of the right of way cannot be sold to pay an assessment of this kind.

By section 14 of the Act relating to special improvement districts (Chap. 89, *supra*) one of two methods of assessment for paying the cost of the improvements may be pursued, *viz.*, by area, the city assuming or not, as it chooses, the cost of the street and alley intersections, or by foot frontage, apportioning the cost to each lot or parcel of land within the district "bordering

or abutting upon street or streets whereon or wherein the improvement has been made.” The city chose the latter method, and if, pursuing it, the property here involved could be lawfully assessed, we see nothing in the fact that it is occupied by a railway which would necessarily prevent its sale upon failure to pay the assessment. (*Northern Pac. Ry. Co. v. Richland County*, 28 N. D. 172, Ann. Cas. 1916E, 574, L. R. A. 1915A, 129, 148 N. W. 545.) What use the purchaser could make of it need not be considered.

The choice allowed the municipality by the provisions of section 14 is apparently unrestricted; but in reality this is not so. For the purposes of the Act, the term “lot or parcel of land” is deemed to include a railroad right of way held as an easement; so, doubtless, the respondent’s right of way was subject [1] to assessment. But the easement—assuming that it and not the tract is offered for sale—is not and cannot be anything more than a mere incorporeal hereditament, a naked right of passage which the respondent shares with the general public, because it is impressed upon an open street, the fee to which is in the public; hence to say that this easement could be assessed is an altogether different thing from saying that it could be assessed in the particular mode here pursued. The available method of assessing any “lot or parcel of land,” however defined, is of necessity limited by its character or situation; and just how an easement such as this can be said to border or abut upon the street or anything else, it is impossible to conceive. Its situation is similar to that of a lot located away from Main street. Such a lot could have been included in the district and assessed for part of the cost of paving, but not in this way; so here the nature of the property subject to the assessment precluded the use of the front foot method. (*South Park Commrs. v. Chicago B. & Q. R. Co.*, 107 Ill. 105.)

Considering, however, that it was the tract itself—not the easement—which was assessed, and assuming that it could be assessed upon some basis, then to support this particular levy we should be obliged to hold that part of the street itself abuts

upon the street, and this involves—as the trial judge remarked—“a legal solecism.” (*South Park Commrs. v. Chicago B. & Q. R. Co.*, *supra*; *Holt v. City of East St. Louis*, 150 Ill. 530, 37 N. E. 927.)

Finally, realizing that the tract itself is assessed and offered [2] for sale, the fact that it is part of the street becomes an insuperable obstacle. As such it is not and cannot be “property owned or controlled” by the respondent; it is owned by the public, under the exclusive control of the city and thus not the kind of “lot or parcel of land” authorized by the Act to be assessed. Nor is there anything in the Act to warrant the view that the city can be authorized to sell a part of its own street for the purpose of paying an assessment of this character.

We are convinced that the conclusion of the district court was correct and, accordingly, the judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. CAMPBELL ET AL., RELATORS, v. STEWART,
GOVERNOR, ET AL., RESPONDENTS.

(No. 4,202.)

(Submitted March 25, 1918. Decided March 27, 1918.)

[171 Pac. 755.]

*War Defense Act—Constitution—Title—Appropriations—
Donations—Lending State's Credit—“Debt”—State Bonds.*

Constitution—Character of Instrument.

1. The provisions of the Constitution cannot be suspended, without its authority, for any reason, and are therefore as binding in time of war as in time of peace.

Same—War Defense Act—Title—Sufficiency.

2. *Held*, that the War Defense Act (Chap. 21, Ex. Sess. 1918) has to do with but one subject, which is clearly expressed in its title, *vis.*: “to assist the United States in carrying on and prosecuting the

war now existing between the United States and the German and Austrian empires," and therefore does not contravene the provisions of section 23, Article V, of the Constitution.

[As to the effect of constitutional provision requiring a statute to embrace but one subject, which shall be expressed in the title, see note in 61 *Am. Dec.* 337.]

Same—Appropriations—Separate Bill.

3. The Act *supra* is not subject to the constitutional objection that, while it appropriates money such appropriation is not made by a separate bill embracing one subject, as required by section 33, Article V, of the Constitution.

Same—Appropriations—Charitable Purposes.

4. The Act above is not objectionable as appropriating money for charitable, industrial or benevolent purposes "to any person, corporation or community not under the absolute control of the state," within the meaning of section 35, Article V, of the Constitution.

Same—Gifts—Donations—Lending State's Credit.

5. The Act is not repugnant to section 1, Article XIII, of the Constitution, forbidding the state from making loans, giving credit or making gifts or donations to persons, corporations or associations.

Same—Appropriations—Defense of Nation.

6. The purpose of Chapter 21, Ex. Sess. Laws, 1918, being to assist in the defense of the United States, the appropriation made therein falls within the exception found in section 12, Article XII, of the Constitution, under which the legislature may properly make an appropriation without a fund behind it, and without provision having first been made for levying a tax to furnish such fund, it in these circumstances having the power to authorize any proper public agency to procure the necessary funds by borrowing, *i. e.*, the sale of bonds.

Same—"Debt"—Act Does not Create.

7. The Act does not create a "debt" within the meaning of section 2, Article XIII, of the Constitution, forbidding the creation of a debt without providing by irrepealable law for the levy of a tax until the indebtedness therein provided shall have been fully paid or discharged.

Statutes—Constitutionality—How Determined.

8. No Act of the legislature will be pronounced unlawful unless its nullity is made manifest beyond a reasonable doubt.

Original application by the State, on the relation of Will A. Campbell and others, for writ of injunction against Samuel V. Stewart, Governor, and others, as members of the State Board of Examiners. Demurrer to complaint sustained and proceeding dismissed.

Messrs. Gunn, Rasch & Hall, Mr. H. S. Hepner, Mr. Wm. T. Pigott, Mr. Wm. Scallon, Mr. O. W. McConnell and Mr. C. B. Nolan, for relators, submitted a brief; *Mr. Pigott, Mr. Nolan and Mr. Scallon* argued the cause orally.

Mr. S. C. Ford, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for Respondents, submitted a brief; *Mr. Woody* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Suit to enjoin the issuance and sale of bonds under the authority of Chapter 21, Extra Session Laws of 1918, known as the War Defense Act. The title of the Act is as follows: "An Act appropriating the sum of five hundred thousand dollars to be expended by the Montana council of defense in aiding and assisting the United States in the carrying on and prosecuting of the war now existing between the United States and the German and Austrian empires; designating the purposes for which such appropriation may be expended by the Montana council of defense; authorizing the state board of examiners to issue bonds or warrants in excess of the constitutional limit of indebtedness and to levy a tax upon all property in the state subject to taxation for the purpose of paying the indebtedness so incurred, and the payment of the interest thereon; authorizing the Montana council of defense to make and adopt rules and regulations governing the expenditure of such money and to enter into any and all contracts which the Montana council of defense may deem necessary and proper in connection with the expenditure thereof; and authorizing the state board of examiners to make temporary loans for such sum or sums as may be necessary to meet such appropriation when there is insufficient unappropriated money in the state treasury in the war defense fund for such purpose."

The pertinent provisions of the Act are:

"Section 1. The board of examiners of the state of Montana is hereby authorized and empowered to borrow any sum of money in an amount not exceeding five hundred thousand dollars upon the credit of the state of Montana, and there is hereby appropriated five hundred thousand dollars or so much thereof as may be necessary out of the receipts of any such loan or loans so made, under the provisions of this Act for the purpose of aid-

ing and assisting the United States in carrying on and prosecuting the war and for repelling invasion and suppressing insurrection.

“Section 2. The money hereby appropriated may be expended by the Montana council of defense, with the approval of the state board of examiners, by loan, for the purpose of encouraging, aiding and assisting those engaged in agricultural pursuits, in procuring seed, in planting, sowing, raising and harvesting crops, and in procuring labor and assistance necessary for such purposes, for the purpose of encouraging, aiding and assisting farmers and stock-growers in procuring livestock and feed for the same, and in raising livestock, and in procuring labor and assistance necessary for such purposes, and for the purpose of transporting and aiding and assisting in the transportation and marketing of crops and livestock, to the end that the food supplies of the nation may be sufficient and adequate for the support of its armies, and for all other purposes public exigencies may require for the support, aid and assistance of the United States in carrying on and prosecution of such war.”

“Section 7. The board of examiners of the state of Montana is hereby empowered and authorized to issue bonds or warrants in a sum not exceeding five hundred thousand dollars at an interest-bearing rate not to exceed six per cent per annum and upon such other terms and conditions as such board may deem wise, proper and necessary to obtain funds sufficient to meet any loans or expenditures made under the provisions of this Act: *Provided*, however, that the life of any such bonds issued shall not be greater than five years and may be redeemed at any interest-paying period or within thirty days thereafter.”

“Section 14. This Act and all of its provisions is for the purpose of aiding and assisting the United States in carrying on and prosecuting the war now existing between the United States and the German and Austrian empires and all other enemies and to repel invasion and suppress insurrection, and for no other purpose.”

The complaint avers that pursuant to said Act the defendants, proceeding as the state board of examiners, have resolved to issue, have advertised that they will offer for sale, and do threaten to issue and sell bonds of the state in the sum of \$500,000, to be dated March 20, 1918, bearing interest at six per cent, interest payable semi-annually, said bonds to be due in five years, but redeemable at the option of said board or within thirty days after any interest-bearing period; that the Act above mentioned and pursuant to which the defendants are proceeding is void as in contravention of the provisions of sections 23 and 33 of Article V, section 35 of Article V, section 12 of Article XII, section 1 of Article XIII, and section 2 of Article XIII of the state Constitution; and that the relators, as taxpayers, will be greatly and irreparably injured and damaged, should said bonds be sold and delivered to the purchasers thereof.

Responsive to an order to show cause, the defendants have appeared, and by general demurrer they join issue upon the question of law now before us, to-wit, whether the Act is contrary to the Constitution in the respects alleged.

We desire at the outset to express to counsel of record our appreciation of their efforts to aid us in the solution of this problem. We likewise wish to disclaim any view that the [1] Constitution of this state is in abeyance because the nation is at war; or that the Constitution is inadequate to serve the state at such a time, or that the exigency justifies or has called forth any canon of construction not applicable in a season of "profoundest peace." Whatever is legally done by any public agency at any time must be done either with the sanction or without the inhibition of the Constitution; for, like the national charter, it "is a law for rulers and people, equally in war and peace, and * * * no doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended" without its authority for any reason. (*In re McDonald*, 49 Mont. 454, Ann. Cas. 1916A, 1166, L. R. A. 1915B, 988, 143 Pac. 947; *Ex parte Milligan*,

4 Wall. (U. S.) 2, 18 L. Ed. 281.) So premising, we come to the matter in hand.

1. The respects in which it is alleged that sections 23 and 33 [2, 3] of Article V have been contravened are: "That said Act contains more than one subject, and each of the subjects is not clearly expressed in the title," and "said Act appropriates money, but such appropriation is not made by a separate bill embracing one subject." Upon argument these objections were abandoned, and we think properly so, because they are groundless. Assuming that the Act is one of appropriation, such appropriation is for only one subject, clearly indicated in both the title and the body of the Act, namely, "to assist the United States in carrying on and prosecuting the war now existing between the United States and the German and Austrian empires." This is a particular purpose, defined as well as it can be. The other clauses of the title and the other provisions of the Act have to do with ways and means for carrying out such purpose; they are not separate purposes, and thus do not render the Act obnoxious to the sections referred to. (*State ex rel. Hay v. Alderson*, 49 Mont. 387, Ann. Cas. 1916B, 39, 142 Pac. 210; *Hill v. Rae*, 52 Mont. 378, Ann. Cas. 1917E, 210, L. R. A. 1917A, 495, 158 Pac. 826.)

2. Nor, with equal propriety, do the relators place any [4] reliance upon the alleged departure from section 35 of Article V. That section forbids appropriations for "charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state." This is manifestly not such an appropriation, and the mere fact that the moneys may be effective through individuals, associations or corporations in certain ways does not make it so. (*State ex rel. Cryderman v. Wienrich*, ante, p. 390, 170 Pac. 942.)

3. The same considerations avail to clear the Act of any [5] repugnance to section 1 of Article XIII. This is primarily not an Act "to authorize the state to loan, give or extend its credit to or in aid of individuals, associations or corporations,"

nor "to make donations or gifts to individuals, associations or corporations," nor "to loan state funds to or in aid of individuals, associations or corporations," nor to authorize the "use of public funds or moneys of the state for private purposes"; on the contrary, if it is any of these things, it is so only secondarily or incidentally. The purpose of the Act, as apparent on its face and as emphasized in section 14, is the most public one that could well be imagined. (*City of Lowell v. Oliver*, 8 Allen (Mass.), 247; *Freeland v. Hastings*, 10 Allen (Mass.), 570; *Franklin v. State Board of Examiners*, 23 Cal. 173; *People v. Pacheco*, 27 Cal. 175.) The United States is at war, and to assist the United States in war is expressly recognized by the Constitution as a proper and probable occasion for the use of state funds (Const., Art. XII, sec. 12). Moreover, this state, as one of the United States, is at war; when aiding the United States, this state but defends itself, and thus exercises the highest attribute, as it observes the most solemn duty, of sovereignty. That in pursuing this public purpose the state, through its legislature, may adopt or prescribe any mode or means reasonably adapted to accomplish such purpose is too well settled for debate. And if it be true that an "army travels on its stomach," then to enlarge the food production, as this Act designs, is as essential and important an aid to war as the furnishing of munitions or the equipping of men. The events of the past three years, as of all previous history, bear eloquent testimony to the vast, if not paramount, importance of food production, not only for armies but for the people behind the armies, as a measure of war; and though in the last analysis such production harks back to the "individual, association or corporation," and though, to stimulate such production, either gifts or loans are employed, the outstanding and controlling public purpose is the end that justifies and validates the means. (*State ex rel. Cryderman v. Wienrich*, *supra*; *Daggett v. Colgan*, 92 Cal. 53, 27 Am. St. Rep. 95, 14 L. R. A. 474, 28 Pac. 51; *Norman v. Kentucky Board, etc.*, 93 Ky. 537, 18 L. R. A. 556, 20 S. W. 901.)

4. We come, then, to the provisions of section 12, Article XII, [6] and these, so far from being violated by the Act before us, are in a sense the warrant for its existence. This section provides: "No appropriation shall be made or any expenditures authorized by the legislative assembly whereby the expenditures of the state during any fiscal year shall exceed the total tax then provided for by law, and applicable to such appropriation or expenditure, unless the legislative assembly making such appropriation shall provide for levying a sufficient tax, not exceeding the rate allowed in section 9 of this Article, to pay such appropriations or expenditures within such fiscal year. *This provision shall not apply to appropriations or expenditures to suppress insurrection, defend the state, or assist in defending the United States in time of war.*" If this very clear language has any meaning, it is that, whereas the legislative power over appropriations and expenditures, unlimited save as restricted by the Constitution, is in fact restricted as above set forth, such restriction does not apply to appropriations or expenditures to suppress insurrection, defend the state, or assist in defending the United States in time of war; and therefore, for such purposes, the power of the legislature stands without limit or restriction. (*People v. Pacheco, supra; In re State Board of Equalization*, 24 Colo. 446, 51 Pac. 493.) So, conceding that the Act before us does not attempt to meet the restriction above set forth, its validity is unaffected by that fact, because, if it is an Act of appropriation, the appropriation is for purposes which take it out of the range of the restriction. Is this, then, an Act of appropriation? We think it is both an Act of appropriation and an Act to authorize expenditures. Its title proclaims it as "an Act appropriating the sum of" \$500,000, " * * * designating the purposes for which such appropriation may be expended"; and this proclamation is borne out by the language of section 1, "There is hereby appropriated," and of section 2, "The money hereby appropriated may be expended," etc., and of section 6, "The Montana council of defense shall adopt rules * * * governing * * * the expenditure of the money

hereby appropriated," and of section 9, "The money appropriated by this Act shall be credited," *etc.*, and of section 11, "Any premiums required * * * may be paid out of the money appropriated by this Act," and of section 12, "The Montana council of defense shall keep * * * accounts * * * of the money hereby appropriated," and of section 14, "Upon the termination of such war the power * * * to expend the money hereby appropriated shall cease," *etc.* Indeed, there is nothing at all to suggest that the Act is not an Act of appropriation save the absence of funds in hand to meet it, and the first clause of the Act, granting authority to the board of examiners to borrow whatever sum, not exceeding the amount of the appropriation, necessary to create a fund to answer to the appropriation. But it is entirely clear that neither of these suffices to characterize the Act as other than an appropriation. Its purpose is to defend the state and to assist in the defense of the United States, and by the very language of section 12, Article XII, such a purpose may be served by an appropriation which has no funds behind it nor any provision to furnish such a fund through taxation. Obviously the appropriation is made to be used, but not even the state can spend money which it does not possess; and the only way the money not possessed can be gotten is by taxing or borrowing. If then, the legislature can, under the Constitution, make an appropriation for war purposes, without a fund and without a tax to furnish the fund, it must be possible for that body to make an appropriation, authorizing any proper public agency to procure so much of the money as may be required by borrowing it; and this is the office performed by the first clause of the Act, elaborated later in section 7 of the Act.

5. This brings us to the last objection, *viz.*, that the Act [7] creates a debt without providing by irrepealable law, "for the levy of a tax sufficient to pay the interest and to extinguish the principal of such debt, within the time limited by such law for the payment thereof." If this Act creates a debt within the meaning of this section, then undoubtedly it is void, for no pro-

vision such as this section requires, is made. But to sustain this objection would be to nullify all we have just said; for if the legislature can make an appropriation for war purposes without funds and without a levy of taxes to meet the appropriation, by authorizing the creation of such fund by borrowing, it cannot be that the very thing not necessary for the appropriation is necessary to create the fund to make the appropriation effective. It should be noticed that the Act does not in terms create a debt nor authorize the creation of a liability in a sum certain. It empowers the board of examiners to borrow "any sum *not exceeding* \$500,000," to "issue bonds or warrants in a sum *not exceeding* \$500,000 at an interest-bearing rate *not to exceed* six per cent" upon such terms and conditions "as such board may deem wise, proper and necessary," provided "the life of any such bond issue shall *not be greater* than five years and may be redeemed at any interest-bearing period or within thirty days thereafter." How, under these provisions, could the legislature comply with section 2 of Article XIII? What part of the appropriation would be needed, what amount would be borrowed, what bonds or warrants would be issued, what interest they would bear, what time they would run, were all unknown quantities; yet all quantities requisite to the provision demanded by section 2 of Article XIII. Must we then conclude that for this very reason the Act is void, notwithstanding the power recognized by section 12 of Article XII? Or must the answer be that this Act does not create a debt within the meaning of section 2 of Article XIII? The latter, we think, must be the answer, because the very terms of the section imply and contemplate a specific obligation created by the legislature itself, of such a character that computation will disclose in advance what tax levy is requisite to pay the interest on and to extinguish the debt at its certain maturity. As aptly said by counsel: "It would be idle to assume that the legislature should provide for the payment of an indebtedness of \$500,000 when no such indebtedness might come into existence at all. Whether \$500,000 would be expended or a less amount depends entirely

upon the action of the council and depends likewise upon the continuance of the war. It is possible that the war may terminate without \$30,000 of this money being invested or expended, and the anomalous situation would be presented that taxes would be collected to pay \$500,000 indebtedness when as a matter of fact only \$30,000 of indebtedness had been contracted."

In reaching our conclusion we need not assert that we are [8] altogether free from doubt; but doubt is not sufficient to overturn an Act of the legislature. In the case of a statute assailed as unconstitutional, we stand committed to the rule that no such enactment will be pronounced invalid unless its nullity is made manifest beyond a reasonable doubt. (*Spratt v. Helena Power etc. Co.*, 37 Mont. 60, 94 Pac. 631; *State ex rel. Hay v. Alderson*, *supra*.) In respect of the Act before us we cannot say that this has been done; on the contrary, our views incline us to hold that it is a valid exercise of the legislative power, and that the bonds proposed to be issued pursuant to its provisions will become legal charges against the state.

The demurrer to the complaint is therefore sustained, and, as we are advised that the relators cannot plead to further effect, a decree of dismissal must be entered. So ordered.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. KELLY, ATTORNEY GENERAL, APPELLANT, v.
FARMERS' STATE BANK OF BRIDGER, RESPONDENT.

(No. 3,885.)

(Submitted February 28, 1918. Decided March 30, 1918.)

[172 Pac. 180.]

Banks and Banking — Insolvency — Preferred Claims — Trust Funds—Recovery Back—Identification—Collection of Commercial Paper—Conversion.

Agency—Trust Funds—Recovery Back—Identification.

1. The owner of property (including money) intrusted to one who occupies a fiduciary relation to him, as, for instance his agent, may follow and retake it from the agent or anyone in privity with him who is not a *bona fide* holder for value, whether it remains in its original form or in a different or substituted form, provided it can be identified as the same property or the product or proceeds of it; and if the property be money, it is immaterial that it has been mingled with private moneys of the agent, or his privy, who has knowledge of the source from which it has been obtained.

[As to reclaiming funds of trust deposited in bank which has become insolvent, see note in 86 Am. St. Rep. 801.]

Same—Insolvent Banks—Creditors—Who are not.

2. The owners of a certificate of deposit sent by them to a bank with instructions to collect the amount of it and upon collection to place it to their credit did not become its creditors either by the unauthorized act of the bank in placing the amount thereof to their credit without collection having been made, or by its omission to charge the account after failure to collect, so as to wipe out the apparent credit.

Same—Banks—Agency—Collection of Commercial Paper.

3. A bank to which a certificate of deposit had been sent with instructions to collect and, if successful, to place the amount of it to the credit of the owners, sustained the relation of agent to them, with authority to change that relation to that of debtor on the condition that collection should be made; failure to collect made the bank a bailee of the owners, with no other authority than to return the certificate to them.

Same—Banks—When Guilty of Conversion.

4. A bank which without authority discounted a certificate of deposit left for collection was guilty of a willful conversion of it to its own use.

Same—Insolvent Banks—Preferred Claims.

5. Since the owners of the certificate of deposit *supra* did not become creditors of the bank, and the bank sustained to them the relation of agent, they could follow and retake the money realized by the bank through its wrongful act in discounting it, and a portion of which found its way into the hands of the receiver, to the

Authorities discussing the question as to trust in proceeds of collection by insolvent bank where proceeds have been mixed with its own funds are collated in a note in 32 L. R. A. 719.

extent to which they could identify it, and to that amount were entitled to a preference over the general creditors of the insolvent bank.

Appeals from District Court, Carbon County; Geo. W. Pier-son, Judge.

IN AN ACTION by the State of Montana on the relation of D. M. Kelly, Attorney General, against the Farmers' State Bank of Bridger, James S. Tebbs and C. W. Taggart filed their petition asking that H. B. Miller, receiver of said bank, be required to recognize a claim against the bank as a preferred one. From a judgment against them and from an order denying their motion for a new trial, petitioners appeal. Reversed and remanded.

Cause submitted on briefs of Counsel.

Mr. F. B. Reynolds, for Appellant.

It is submitted that a transaction such as is here involved, *i. e.*, a deposit for collection and credit with credit entered upon the books of the bank, may or may not constitute a general deposit; that neither the form of the indorsement upon the item nor the entry of credit upon the books of the bank is controlling; but that the effect of the transaction is to be determined by the mutual understanding and intention of the parties, express or implied; and that the facts in this case show a mutual intention to treat the certificate of deposit as a collection item rather than cash. (3 R. C. L., "Banks and Banking," secs. 150-152; *Balbach v. Frelinghuysen*, 15 Fed. 675; *Hilsinger v. Trickett*, 86 Ohio St. 286, Ann. Cas. 1913D, 421, 99 N. E. 305; *Morris-Miller Co. v. Pressentin*, 63 Wash. 74, 114 Pac. 912; *Fayette National Bank v. Summers*, 105 Va. 689, 7 L. R. A. (n. s.) 694, 54 S. E. 862; *Bailie v. Augusta Savings Bank*, 95 Ga. 277, 51 Am. St. Rep. 74, 21 S. E. 717; *Tyson v. Western Nat. Bank*, 77 Md. 412, 23 L. R. A. 161, 26 Atl. 520; *Armour Packing Co. v. Davis*, 118 N. C. 548, 24 S. E. 365; *National Gold Bank & Trust Co. v. McDonald*, 51 Cal. 64, 21 Am. Rep. 697;

Butchers & Drovers' Nat. Bank v. Hubbell, 117 N. Y. 384, 15 Am. St. Rep. 515, 7 L. R. A. 852, 22 N. E. 1031; *Armstrong v. National Bank of Boyertown*, 90 Ky. 431, 12 Ky. Law Rep. 393, 9 L. R. A. 553, 14 S. W. 411; *Perth Amboy Gaslight Co. v. Middlesex County Bank*, 60 N. J. Eq. 84, 91, 45 Atl. 704.)

As the bank did not give notice to Tebbs and Taggart of the entry of credit upon the bank's books, such entry, being prior to collection, did not change the relation of the bank to petitioners from that of agent to that of debtor. (*Guignon v. First Nat. Bank*, 22 Mont. 140, 55 Pac. 1051; 5 Cyc. 498.)

The relation between Tebbs and Taggart and the bank was that of bailor and bailee; hence the cash assets which came into the hands of the receiver, to the extent of \$3,000, are impressed with a trust in favor of petitioners. (3 R. C. L., "Banks and Banking," sec. 268; *Guignon v. First Nat. Bank*, *supra*; *Kansas State Bank v. First State Bank*, 62 Kan. 788, 64 Pac. 634; *State v. Bank of Commerce*, 61 Neb. 181, 52 L. R. A. 858, 85 N. W. 43; *Plano Mfg. Co. v. Auld*, 14 S. D. 512, 86 Am. St. Rep. 769, 86 N. W. 21; *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786, 59 Am. St. Rep. 572, 69 N. W. 115; *Western German Bank v. Norvell*, 134 Fed. 724, 69 C. C. A. 330; *Butler v. Western German Bank*, 159 Fed. 116, 86 C. C. A. 306.)

That the proceeds of plaintiffs' certificate of deposit were mingled with the funds of the bank and went to enhance the apparent value of the assets of the bank is sufficient identification. (3 R. C. L., "Banks and Banking," sec. 268; *Yellowstone County v. First Trust & Savings Bank*, 46 Mont. 439, 128 Pac. 596; *Western German Bank v. Norvell*, *supra*; *Richardson v. New Orleans Debenture Redemption Co.*, 102 Fed. 780, 52 L. R. A. 67, 42 C. C. A. 619.)

Messrs. Nichols & Wilson, for Respondent.

The first question presented is whether the title to the certificate in question and to the proceeds realized therefrom by discounting to the Helena bank passed to the Bridger bank. The following citations support the conclusion that it did pass: (*Fourth Nat. Bank v. Mayer*, 89 Ga. 108, 14 S. E. 891; *Pacific*

Bank v. Mitchell, 9 Met. (50 Mass.) 297; *United States Nat. Bank v. Greer*, 53 Neb. 67, 41 L. R. A. 439, 73 N. W. 266; *Perth Amboy Gaslight Co. v. Middlesex County Bank*, 60 N. J. Eq. 84, 45 Atl. 704; *Williams v. Cox*, 97 Tenn. 555, 37 S. W. 282.)

Even though it should be held that the title to this certificate did not pass to the bank and that the conduct of Trumbo, the cashier, in selling the certificate and in leading the claimants to believe that the certificate was still subject to their order, constituted a fraud and that thereby the funds became trust funds, we yet maintain that the claimants are not entitled to an order of preference for the full amount. The bank closed its doors on March 26, and the balance then remaining in the Helena bank to the credit of the Bridger bank did not exceed \$1,000. If a trust is found to exist by reason of the conduct of Trumbo, then the rule should be that the claimants are entitled to a preference payment to the extent only that their claim bears to all claims of like character existing at the time the bank closed, and which have been proved and allowed as such since the appointment of the receiver. Justice can only be done by treating all the preferred claims as on the same basis and prorating the funds available among all creditors of that class. We have found no authority concerning this identical question which we last present for the consideration of the court, but it occurs to us that carrying out the theory upon which preferences are allowed, the rule above stated must be adopted in matters of this kind as the only fair one to both classes of creditors.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On March 26, 1915, the action in which this proceeding is entitled was brought by the attorney general of the state in the district court of Carbon county to have the Farmers' State Bank at Bridger (hereafter referred to as the bank) declared insolvent and to obtain the appointment of a receiver to take charge of its assets and wind up its affairs. H. B. Miller, the respondent herein, was appointed receiver and has been acting as such until the present time. On November 15, 1915, James S. Tehbs

and C. W. Taggart, the appellants herein, doing business as copartners under the firm name of Tebbs & Taggart, filed their petition in the action, asking that the receiver be required to recognize as a preferred claim the sum of \$3,000, in which amount the bank was indebted to them, and to obtain an order directing him to pay the same in full out of the assets of the bank, together with accrued interest. The receiver joined issue by answer upon the allegations of the petition. A hearing by the court resulted in an order denying the relief demanded and directing the receiver to recognize the debt due to the appellants as a general claim and to make payment thereof accordingly. The proceeding comes before this court on appeals from this order and from an order denying appellants' motion for a new trial.

It is open to question whether the method of procedure adopted by the appellants to secure the relief sought was not in some respects inappropriate. There is grave doubt whether the district court could entertain a motion for a new trial and whether an appeal lies from the order disposing of the motion. Counsel for the respondent having by their silence assumed that the procedure was in all respects appropriate and that both appeals are properly before this court, we refrain from considering and deciding any question in this behalf, and proceed at once to answer the single inquiry presented, *viz.*: Are the appellants entitled to the relief demanded?

There is no substantial controversy as to the facts: During the year 1915 the appellants kept moneys on deposit with the bank subject to their check. They also borrowed moneys from the bank from time to time, as the exigencies of their business required. On November 12 they mailed to the bank a certificate of deposit for \$3,000, issued by the Central State Bank, at White Sulphur Springs, Montana, on March 6, due four months after date, in favor of E. J. Anderson, and indorsed by him to the appellants, with these instructions: "If you can collect same credit our account with the \$3,000 and oblige." Mr. Trumbo, the cashier, at once acknowledged receipt of the certificate, stating that it had been "entered for collection." In fact,

appellants' checking account had been credited with the amount of the certificate as cash. Of this appellants knew nothing until they received a letter from Mr. Trumbo on March 22, in which he wrote them as follows: "We are in receipt of advice from our correspondent that certificate for \$3,000 payment was refused on as not being due, and your account has been charged with that amount. We could give you credit on your note for the amount of the certificate. Awaiting your early reply regarding this matter, we remain," *etc.* On March 13, Mr. Trumbo had forwarded the certificate for collection to the Union Bank & Trust Company, at Helena (hereafter referred to as the Helena bank). On March 20 the Helena bank wrote Mr. Trumbo as follows: "We received from you the other day a certificate of \$3,000, issued by the Central State Bank of White Sulphur Springs, dated March 6 and due four months after date. This has now been returned to us from White Sulphur Springs, as they refuse to pay it until maturity and we have accordingly charged the amount back to your account. It occurs to us that possibly you would prefer to have us carry this for you on an 8% basis and if so, will be glad to do this, otherwise will return it to you." In response to this letter Mr. Trumbo wrote on March 22: "We are in receipt of yours of March 20 relative to certificate of deposit for \$3,000. We will be glad to let you have this at the rate of 8% mentioned in your letter. Trusting to receive immediate credit for same, we remain," *etc.* On the following day the Helena bank wrote to Mr. Trumbo: "As requested in yours of the 22, we have credited your account \$3,000 for the White Sulphur Springs certificate and have charged your account for the discount on same at 4% for three months and a half, \$35." The record does not disclose the fact, but we may presume from the form in which the offer of the Helena bank was made and the result of the negotiations, that the certificate bore interest at the rate of 4%. On March 24 after the appellants had received from Mr. Trumbo the letter of March 22, Mr. Taggart went to Bridger intending to obtain the certificate. He was told by Mr. Trumbo that the bank's correspondent at Helena had kept it there until it should

be advised by the bank what disposition to make of it. There was some conversation between them in regard to a loan by the bank to appellants and also a proposal by the bank to credit appellants' note then held by it, but this conversation resulted in nothing definite. The note referred to was in the sum of \$2,000. At the time this conversation occurred it had been negotiated by the bank and was in the hands of the Helena bank. This the appellants did not ascertain until they were called upon by the Helena bank to make payment. Mr. Taggart at that time signified his intention to take up the matter of the loan with Mr. Tebbs upon his return home and inform Mr. Trumbo by telephone later what the appellants would do, but nothing further was done before the bank closed. The appellants did not know until after the bank had closed that the amount of the certificate had not been charged back to their account; nor did they know that the certificate had been discounted by the Helena bank. When the receiver took charge of the bank he found cash on hand and on deposit in correspondent banks amounting to between \$3,000 and \$3,600. The amount in the bank was \$1,200. There was on deposit in the Helena bank a balance of about \$900. The balance of the total was on deposit in other correspondent banks. What the exact amount of this balance was cannot be stated, because the accounts of the bank with the Helena bank were in confusion, and at the time of the hearing of the petition the receiver had not been able to reach a final adjustment of them. When the Helena bank discounted the certificate it gave the bank credit for the proceeds, \$2,965. The bank was at that time indebted to the Helena bank. This accounts for the comparatively small balance due it from the Helena bank. There were no other transactions between the two banks before the receiver took charge.

It is the rule, recognized by the courts generally, that the [1] owner of property intrusted to one who occupies a fiduciary relation with him, such as his agent, may follow and retake it from the agent or anyone in privity with him, not a *bona fide* holder for value, whether it remains in its original

form or in a different or substituted form, provided it can be identified as the same property or the product or proceeds of it. The rule extends to and includes moneys as well as other property, even though it appears *prima facie* that they have been mingled with private moneys of the agent, or his privy, who has knowledge of the source from which they have been obtained. In such cases the entire fund in the hands of the agent, or his privy, is impressed with a trust in favor of the owner to the extent to which the moneys have become a part of it; and the burden is upon the agent, or his privy, to rebut the *prima facie* case made by the owner, or to separate and distinguish his own moneys from those composing the entire fund. (*Yellowstone County v. First Trust & Sav. Bank*, 46 Mont. 439, 128 Pac. 596.) This court has heretofore declared the right of a creditor of an insolvent bank in the hands of a receiver to have preference over the general creditors in the payment of his claim, the facts disclosing that the bank bore to him the relation of agent or bailee in the transaction out of which the claim grew. (*Guignon v. First Nat. Bank*, 22 Mont. 140, 55 Pac. 1051, 1097; *Yellowstone County v. First Trust & Sav. Bank*, *supra*.)

Looking to the instructions which were transmitted by [2, 3] appellants to the bank with the certificate, the bank became, in the first instance, merely their agent to collect, with the authority to change this relation to that of debtor on the express condition, however, that collection should be made of the amount called for by it. Since the certificate was not due, they could not expect, nor did they intend, to be credited with its value as cash until it had been paid. Hence the authority to credit them was made conditional until payment should be made. It could not have occupied any other relation to appellants than as their agent until the condition was fulfilled. Upon its failure to collect, its conditional authority lapsed and it became a bailee of the appellants, without any authority other than to return the certificate to them. The entry of the credit upon the books of the bank without the authority or assent of the appellants could not make them its creditors; nor could the omission to charge the account after failure to collect, so as to

wipe out the apparent credit, have a like result. The bank, therefore, had no authority to discount the certificate to the [4] Helena bank. In doing so it became guilty of a willful conversion of it to its own use. It is clear, then, that the appellants, never having become creditors of the bank, were entitled to follow and retake the certificate or its proceeds, so long as they could find the one or identify the other. Instead of [5] pursuing the certificate and recovering it or its full value from the Helena bank by appropriate action, which, upon the facts disclosed in this record, they had a perfect right to do, they chose to pursue and take the proceeds. They must, therefore, in this proceeding be limited in their preferential right to the amount of the proceeds shown to have found its way into the hands of the respondent. Upon the question whether they may still bring their action against the Helena bank, we express no opinion, because it does not arise in this proceeding. The balance in the Helena bank was undoubtedly a part of the proceeds of the certificate, for, since it does not appear that any other transactions took place between the bank and the Helena bank after March 22, and the credit given to the bank on that date by the Helena bank was for the proceeds of the certificate only, the balance is fully identified as a part of these proceeds. Appellants are entitled to preferential payment in this amount. They are not entitled to preferential payment, however, out of the other balances, as they do not appear to have been derived in any measure from the proceeds of the certificate. They belong to the general assets of the bank, to be distributed among the general creditors.

The orders appealed from are set aside and the proceeding is remanded to the district court, with directions to order the receiver to recognize appellants' right to preferential payment to the amount of the balance received by him from the Helena bank.

Reversed and remanded.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

TETRAULT, RESPONDENT, v. INGRAHAM ET AL., APPELLANTS.

(No. 3,899.)

(Submitted March 9, 1918. Decided March 30, 1918.)

[171 Pac. 1148.]

*Personal Property—Judicial Sales—Failure of Title—Remedy—Exemptions—Waiver—Statute of Frauds—Common Law.***Personal Property—Judicial Sales—Failure of Title—Remedy.**

1. Though a purchaser of real property at a judicial sale, title to which fails, has a double remedy under section 6844, Revised Codes, *viz.*, he may bring action in the nature of one for money had and received, or have the original judgment revived for his own use and benefit and proceed against the judgment debtor, a buyer of personalty is confined to the latter remedy.

Common-law Actions—Rule.

2. Common-law actions cannot be maintained in this state, where provision is made by the Code prescribing the remedy.

Personal Property—Exemptions—Duty of Claimant.

3. Where a debtor owns more property of a given class than the law exempts, he must, in order to secure the benefit of the exemption, identify the property he claims as exempted and segregate it from the portion liable to seizure.

Same—Exemptions—Sale—Waiver.

4. The right to claim property as exempt may be waived, and is waived when it is sold, since one cannot claim exemption in property which he does not own.

Same—Statute of Frauds—Title of Vendee.

5. Where there has been a sale of personal property not accompanied by an immediate delivery and followed by an actual and continued change of possession, the vendee takes title subject to the claim of the vendor's creditor.

[As to when a delivery of personal property does not pass title, see note in 120 Am. St. Rep. 868.]

Appeals from District Court, Flathead County; T. A. Thompson, Judge.

ACTION by A. D. Tetrault against A. J. Ingraham, Sheriff, and the Kalispell Mercantile Company. Plaintiff had judgment, and defendants appeal from it and an order denying them a new trial. Reversed.

Mr. C. W. Pomeroy, for Appellants, submitted a brief, and argued the cause orally.

On liability of execution creditor for return of purchase price upon failure of title to property sold on execution, see note in 36 L. R. A. (n. s.) 1218.

Mr. G. H. Grubb and Mr. F. D. Lingenfelder, for Respondent, submitted a brief.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1912 the Kalispell Mercantile Company recovered judgment against Clyde Drollinger, caused an execution to be issued thereon and placed in the hands of the sheriff for service. The sheriff levied upon two horses found in the possession of Drollinger, and, after due notice, sold them at public auction to A. D. Tetrault for \$340, which amount was paid over and the judgment satisfied. Immediately prior to the sale Drollinger made claim that the property was exempt and notified the sheriff, who in turn notified the judgment creditor. An indemnifying bond was given and the sale proceeded, but when the property was exposed for sale no mention was made of the fact that the property was claimed as exempt and Tetrault had no notice of the fact until after he had paid over the purchase price. On the same day, but after the sale, Drollinger commenced an action in claim and delivery against Tetrault, and such proceedings were had that a judgment was rendered in that action in favor of Drollinger for the return of the horses. Tetrault then commenced this action against the sheriff and the Mercantile Company.

In addition to the foregoing facts it is alleged that the property sold by the sheriff and purchased by Tetrault "was at all said time exempt by law from execution and sale under and by virtue of the laws of the state of Montana." It is further alleged that the sheriff and the Mercantile Company failed, refused and neglected to make known the fact that an exemption claim had been made, but kept such fact secret "for the purpose of injuring and defrauding this plaintiff and the public, and did defraud this plaintiff," out of \$340. Issues were joined and the cause tried, resulting in a judgment for plaintiff. Defendants have appealed from the judgment and from an order denying them a new trial.

The complaint presents something of a dual character—for money had and received, and for damages for deceit—but the theory upon which the trial court proceeded is not left in doubt. By Instruction No. 1 the court told the jury that the action was upon the common law count for money had and received. The court also refused defendants' offered Instructions 6 and 8, which presented the question of defendants' liability for damages for deceit. In support of the theory adopted by the trial court, counsel for respondent cite *Dresser v. Kronberg*, 108 Me. 423, Ann. Cas. 1913B, 542, 36 L. R. A. (n. s.) 1218, 81 Atl. 487. Whatever may be the rule in other jurisdictions, it is established in this state by statute. Section 6844, Revised Codes, provides [1] a remedy in the nature of an action for money had and received, but by its express terms it is applicable only to a sale of real estate. It also furnishes an additional remedy in case title to any property, real or personal, sold at sheriff's sale, fails. It provides that the purchaser may have the original judgment revived for his use and benefit and that he may proceed against the judgment debtor. Since this statute provides alternative remedies for the purchaser of real property, title to which fails, and but a single remedy for the purchaser of personal property, it must be held that the remedy thus provided was intended to be exclusive in all cases wherein failure of title alone furnishes the ground for complaint. (*United States ex rel. Arant v. Lane*, 245 U. S. 166, 62 L. Ed. —, 38 Sup. Ct. Rep. 140.)

The common-law action for money had and received cannot [2] be maintained in this instance. "In this state there is no common law in any case where the law is declared by the Code or the statute." (Sec. 8060, Rev. Codes.) "The Code establishes the law in this state respecting the subjects to which it relates." (Sec. 8061.)

Whether this complaint can be made to state a cause of action for damages for deceit is not now before us.

In the trial of the action the court also proceeded upon the theory that the question whether the property sold by the sheriff

was exempt, was in issue and was to be determined independently of the evidence furnished by the judgment-roll in the claim and delivery action. Instructions 6 and 9, given by the court, presented this question fully and the ruling of the court upon the admission of the judgment-roll limited its evidentiary value to establishing the fact that the horses had been retaken from Tetrault. Upon the theory thus adopted, the court erred in overruling defendants' motion for nonsuit.

There is not any substantive evidence in this record which even tends to show that the property was exempt; on the contrary, the evidence is uncontradicted that in December, 1911, Clyde Drollinger, then the owner of thirteen horses and considerable other personal property, gave a chattel mortgage upon all of it to the Bank of Commerce; that in October, 1912, the debt was discharged and the mortgage satisfied; that a few days later and on October 19, Clyde Drollinger sold all the property previously mortgaged to B. P. Drollinger, the consideration being the payment of the mortgage debt; that this sale was not accompanied by an immediate delivery followed by an actual and continued change of possession, but that the possession remained in the vendor; that on October 24 the sheriff seized two of the horses under the execution in favor of the Mercantile Company and noticed them for sale for October 30, and that immediately before the sale, Clyde Drollinger served upon the sheriff an affidavit and notice of exemption. We shall not stop to consider whether, if the two horses seized by the sheriff had been the only horses owned by Clyde Drollinger at the date of the sale by him to B. P. Drollinger, the transaction would fall under the ban of section 6128, Revised Codes. That is not this case, and the rule adverted to in *Cushing v. Quigley*, 11 Mont. 577, 29 Pac. 337, has no application. Neither is it material to determine whether a debtor must specify the particular property which he claims as exempt when his entire holdings do not exceed the amount allowed by law as exempt. By sections 6824 and 6825, [3] Revised Codes, only three of the thirteen horses could be claimed as exempt. Where a debtor owns more property of a

given class than the law exempts, it is necessary for him, in order to secure the benefit intended to be conferred, to identify the particular property to which his claim attaches; that is, to segregate it from the portion liable to seizure, for under such circumstances the statutes above do not undertake to impress the seal of exemption upon any individual animals or articles of property. (*Field v. Ingreham*, 15 Misc. Rep. 529, 37 N. Y. Supp. [4] 1135; 11 R. C. L. 549, 550.) The right to claim property as exempt is a personal privilege conferred by statute. It may be waived, and is waived when the property itself is sold. (*Wyman v. Gay*, 90 Me. 36, 60 Am. St. Rep. 238, 37 Atl. 325.) The interest of the vendor in it ceases, and it is elementary that one cannot claim exemption in property which he does not own. (18 Cyc. 1382; *Bohn v. Weeks*, 50 Ill. App. 236.)

Though the sale by Clyde Drollinger to B. P. Drollinger was void as against the Mercantile Company, it was valid as between the parties to it, and operated to transfer title to B. P. Drollinger. It could only be set aside to the extent of the creditor's claim, and the overplus realized at the sheriff's sale belonged to B. P. Drollinger, not to the fraudulent vendor. (20 Cyc. 617, 622.)

Counsel for respondent contend that if title had passed to B. P. Drollinger, then the horses were not subject to seizure in [5] satisfaction of Clyde Drollinger's debt. It may be conceded, as a general rule, that the property of one person may not be subjected to the satisfaction of the debt of another; but to that rule section 6128 above has made an exception, and where, as in this case, there has been a sale of personal property not accompanied by an immediate delivery and followed by an actual and continued change of possession, the vendee takes title subject to the claim of the vendor's creditor; so that there is not any inconsistency involved in appellants' contention that title to these horses passed to B. P. Drollinger so as to defeat Clyde Drollinger's claim of exemption, and that they were liable to seizure at the instance of Clyde Drollinger's creditor.

It is not necessary to consider appellants' other specifications of error.

The judgment and order are reversed and the cause is remanded for further proceedings.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

FARR, RESPONDENT, v. STEIN, APPELLANT.

(No. 3,890.)

(Submitted March 12, 1918. Decided April 6, 1918.)

[172 Pac. 135.]

Principal and Agent—Personal Liability of Agent—Undisclosed Principal—Evidence—Harmless Error.

Principal and Agent—Personal Liability of Agent—How Avoided.

1. An agent is not personally liable on a contract entered into by him on behalf of his principal if he disclosed the identity of the latter and made the engagement for him.

[As to suits by undisclosed principals on contracts made with their agents, see note in 55 Am. St. Rep. 916.]

Same—Personal Liability of Agent—Jury Question.

2. Where the evidence of what was said and done at the time defendant, claiming to have acted as agent for another, entered into a contract, was equivocal and furnished the basis for different inferences as to what the intention of the parties was, the question whether defendant acted for himself was properly submitted for determination by a jury.

Evidence—Admission—Harmless Error.

3. Technical error in the admission of evidence will not work a reversal of the judgment if appellant is unable to show that by its admission he was prejudiced.

Appeals from District Court, Custer County; Daniel L. O'Hern, Judge.

ACTION by George W. Farr against Henry Stein. From a judgment in favor of plaintiff and an order denying his motion for a new trial, defendant appeals. Affirmed.

Mr. Henry Stein, appearing *pro se*, submitted a brief and argued the cause orally.

Mr. H. E. Herrick, for Respondent, submitted a brief.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by plaintiff in a justice's court of Miles City township, in Custer county, to recover the reasonable value of professional services performed by him for defendant as an attorney at law. The complaint alleges, in substance, that the plaintiff at the special instance and request of defendant rendered him professional services and gave him professional advice relative to the payment of interest on a promissory note for the sum of \$70, executed by Mrs. Cora Hoppe to one Sol Miness, and the foreclosure of a chattel mortgage given by the former to the latter to secure the payment of the note. For his defense the defendant relied on a general denial. Plaintiff recovered judgment in the justice's court. A trial on appeal in the district court also resulted in a judgment for the plaintiff. Defendant has appealed from the judgment and an order denying his motion for a new trial. He appeared in this court and filed a brief in his own behalf.

His principal contention is that the court erred in denying his motion for a new trial on the ground that the evidence is insufficient to justify the verdict. While tacitly admitting that services of the value alleged were rendered by plaintiff at his special instance and request, he argues that the evidence discloses that in employing plaintiff he was acting, not for himself, but in a representative capacity as agent of Miness, the apparent owner of the note and mortgage, and hence that he did not become personally liable to plaintiff. To fortify his argument [1] he cites many cases which declare the rule that an agent is not personally liable on a contract entered into by him on behalf of his principal if it appears, in point of fact, that he disclosed the identity of his principal and made the engagement for him.

There is no doubt as to the correctness of this rule. Though expressed in varying terms, it is recognized by the courts and text-writers generally. (*Anderson v. Timberlake*, 114 Ala. 377, 62 Am. St. Rep. 105, 22 South. 431; *Hewitt v. Wheeler*, 22 Conn. 557; *Wheeler v. Reed*, 36 Ill. 81; *Murphy v. Helmrich*, 66 Cal. 69, 4 Pac. 958; *Argersinger v. MacNaughton*, 114 N. Y. 535, 11 Am. St. Rep. 687, 21 N. E. 1022; *Neely v. State*, 60 Ark. 66, 46 Am. St. Rep. 148, 27 L. R. A. 503, 28 S. W. 800; *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050; 2 Kent's Commentaries, 630, 631; 31 Cyc. 1555; 1 Mechem on Agency, 2d ed., 1169, 1179; Story on Agency, sec. 267.) Section 5453 of the Revised Codes embodies in principle the same rule. It provides: "One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no other: 1. When, with his consent, credit is given to him personally in a transaction. * * *

Obviously, the assumption by one to act as agent for another, must of necessity require this fact to be declared by him in appropriate terms, as well as the name of the principal for whom he is acting. Obviously, also, when the evidence of what was said and done at the time of the particular transaction, in the light of the attendant circumstances, is equivocal and furnishes the basis for different inferences as to what the intention of the parties was, the question whether defendant acted for [2] himself is for determination by a jury. The evidence embodied in the record here presents such a question. It would serve no useful purpose to set it forth and analyze it in detail. The following summary of it will be sufficient to exemplify this:

The plaintiff and defendant both reside in Miles City, Custer county. At the time the services over which this controversy arose were rendered, Mr. Herrick, as attorney at law, was in the employ of the plaintiff. A question had arisen between defendant and Mrs. Hoppe as to whether defendant had not exacted and collected interest on the note at a rate in excess of that stipulated for therein (Laws 1913, Chap. 36, p. 51), and had become liable to the forfeiture prescribed by the statute.

Defendant sought the advice of Mr. Herrick in this connection, and also his services in the foreclosure of the mortgage, if this should become necessary. Mr. Herrick, aided by plaintiff, took up the question of interest and later advised defendant that there was nothing in the way of a foreclosure, but that this would not be necessary, as Mrs. Hoppe was willing to make a settlement of the matter. In fact, a settlement was pending at that time and later was effected either on the basis then proposed or upon a different basis. When Mr. Herrick and the plaintiff were informed of the terms proposed by the defendant and were requested to put them in writing, they refused to act further for the defendant, because they became satisfied that the terms proposed by him were not fair and just to Mrs. Hoppe. The evidence does not disclose how the settlement was finally made. At no time during the several visits by defendant to plaintiff's office was any mention made of the relation the defendant bore to Miness, the ostensible payee of the note; nor was anything said as to the ownership of either it or the mortgage, the plaintiff assuming that the defendant was the owner and had caused them to be executed by Mrs. Hoppe to Miness, a fictitious person, ostensibly a resident of New York City, to avoid the payment of taxes in Montana. While there is no direct evidence tending to establish this fact, there are circumstances which furnish some basis for an inference that it was the fact, or, to say the least, which leave a reasonable mind in doubt on the subject. This condition of the evidence required a submission of the issues to the jury; and as its conclusion thereon was approved by the trial judge in denying the motion for a new trial, this court must accept it as final.

A second contention is that the court erred in refusing to direct the jury to return a verdict for the defendant and in submitting certain instructions requested by the plaintiff. We have already shown that the evidence called for a finding by the jury. The court, therefore, properly refused to direct a verdict. The objection to the instructions submitted did not question their correctness in point of law, but merely questioned the

propriety of submitting the case to the jury at all. Defendant's contention in this behalf is without merit.

Finally, it is contended that the court erred in admitting and [3] excluding evidence. Technically some of the rulings in this behalf were erroneous. Some of the evidence admitted was immaterial; but it is not pointed out that it prejudiced the defendant, nor, by a careful examination of the entire record, have we been able to ascertain that it did. The evidence excluded was wholly immaterial and did not relate to any issue in the case. The rulings in this connection were correct.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. O'BRIEN, APPELLANT, v. MAYOR OF BUTTE
ET AL., RESPONDENTS.

(No. 3,878.)

(Submitted March 12, 1918. Decided April 6, 1918.)

[172 Pac. 134.]

Police Officers—Removal—Accusation—Evidence—Sufficiency.

Police Officers—Removal—Accusation—Sufficiency.

1. An accusation charging a police officer with falsely stating upon his examination for a position on the force that he had never been convicted of a crime; also that he had failed for over three years to file his official bond, that he had purchased a city warrant contrary to statute, that he had publicly associated with a drunken woman and had asked the proprietor of a lodging-house to violate a city ordinance by lodging the woman without requiring her to register, and that from lack of ability, courage, etc., and use of intoxicants he was incompetent to discharge the duties of a police officer, was sufficient to present the question of his fitness to hold the office.

[As to removal of officers for cause, see note in 135 Am. St. Rep. 250.]

Same—Charges—Sufficiency—Test.

2. The sufficiency of charges against a police officer under the Metropolitan Police Law cannot be defeated by the fact that the

specifications considered as a basis for criminal prosecution may be barred by the statute of limitations.

Same—Evidence—Sufficiency.

3. The charge that a police officer falsely stated upon his application for a position that he had never been convicted of crime, *held* to have been sustained by evidence that he pleaded guilty of petit larceny and suffered a judgment of fine therefor.

Same—"Officer"—Purchasing City Warrant.

4. A police captain is an "officer" within the meaning of sections 371 and 8182, Revised Codes, making the purchase of a city warrant by city officers a crime punishable by disqualification from holding office, the fact that the accused bought the warrant for a brother officer being unavailing as a defense.

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

CERTIORARI by the State on the relation of John F. O'Brien, against the Mayor of the City of Butte and the Examining and Trial Board of the Police Department of said city to review the action of respondents in discharging relator from the police force. From a judgment dismissing the proceedings, he appeals. Affirmed.

Mr. W. E. Carroll, for Appellant, submitted a brief; *Mr. Jos. H. Griffin*, of Counsel, argued the cause orally.

The sufficiency of the charges is one of law for the court. (*McNiff v. City of Waterbury*, 82 Conn. 43, 135 Am. St. Rep. 247, 72 Atl. 572; *Child v. Boyd & Cory B. & S. Co.*, 175 Mass. 493, 56 N. E. 608.) The court may review the evidence to see if there is any substantial evidence to legally warrant the decision below. (*Gilbert v. Board of Police & Fire Commrs.*, 11 Utah, 378, 40 Pac. 264; 6 Cyc. 827.) When the decision below has no evidence to support it, the question then becomes one of law, not of fact. (3 Cyc. 348, 351, 358, 360, 362.) Where a material fact is unsupported, or is contrary to all the substantial evidence, such finding may be in itself an error of law; but the court will not review to determine the preponderance of the evidence. (*Somers v. Wescoat*, 66 N. J. L. 551, 49 Atl. 462; *Kidder v. Townsend*, 3 Johns. (N. Y.) 435.) The sufficiency of the evidence may be reviewed when the question is whether

jurisdictional facts were or were not proved in the inferior court or tribunal. (*Stumpf v. Board of Supervisors*, 131 Cal. 364, 82 Am. St. Rep. 350, 63 Pac. 663; *Whitney v. Board of Delegates of San Francisco Fire Dept.*, 14 Cal. 479; *Stone v. Miller*, 60 Iowa, 243, 14 N. W. 781; *Los Angeles v. Young*, 118 Cal. 295, 62 Am. St. Rep. 234, 50 Pac. 534; *Stevenson v. McDonald*, 77 Ark. 208, 91 S. W. 300; *Blodgett v. McVey*, 131 Iowa, 552, 108 N. W. 239; *Tibbs v. Atlanta*, 125 Ga. 18, 53 S. E. 811.)

Mr. J. V. Dwyer, Mr. John A. Groeneveld and Mr. N. A. Rotering, for Respondents, submitted a brief; *Mr. John T. Andrew*, of Counsel, argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Until his removal as hereinafter mentioned, John F. O'Brien was a police captain of the city of Butte. An accusation was filed against him under the Metropolitan Police Law, which, upon his trial before the police board, was found to be proven, and as the result he was ordered by the mayor to be discharged from the force. He thereupon procured from the district court of Silver Bow county a writ of review, and the proceedings of the board being certified up to the district court, a motion to quash was interposed; the motion was granted and final judgment entered dismissing the proceedings, thus in effect upholding the action of the board and of the mayor. This appeal is from that judgment.

The theory of the appellant in instituting the proceedings in the court below was that the accusation before the board stated no charge upon which he was triable by the board, and the evidence taken to sustain the accusation was too unsubstantial to warrant his removal; hence there was no justification to make the order complained of. Whether, in view of the provisions of section 3308, Revised Codes, this theory is sufficient to justify the use of the writ of review we need not determine, because no question is raised upon the method pursued and because we are

compelled to say that there was a sufficient accusation and sufficient evidence to justify the result.

1. The accusation charges (a) that O'Brien falsely stated [1] to the board upon his examination for a position on the police force that he had never been convicted of a crime, whereas he had prior thereto been convicted of petit larceny; (b) that he had failed for over three years after his appointment to file an official bond as required by law and the ordinances of the city of Butte; (c) that on June 5, 1913, contrary to law he purchased a warrant of the city of Butte issued to J. J. Barry, and on April 16, 1915, collected the face thereof with accrued interest; (d) that in June, 1915, he publicly associated with a drunken woman and asked the proprietor of a lodging-house in Butte to violate a city ordinance by lodging said woman there without registering; (e) that from lack of ability, judgment, courage and addiction to intoxicants he is not, and never was, competent to properly discharge the duties of a police officer.

[2] It may be that, tested by the rigid rules of criminal procedure, this accusation would be found defective; but it is not to be so tested (*Bailey v. Examining & Trial Board of Police Dept.*, 45 Mont. 197, 122 Pac. 572). In every such proceeding the ultimate inquiry is the fitness of the accused to hold his position, and such inquiry is raised by the specific questions whether he is incompetent or has been guilty of neglect of duty or misconduct in office or conduct unbecoming an officer (sec. 3309, Rev. Codes). That the accusation is sufficient on its face to present these questions is clear; and its sufficiency in that respect cannot be defeated by the fact that some of the specifications, considered as a basis for criminal prosecution, may be barred by the statute of limitations.

2. Out of the five specifications, three stand undisputed. The [3] appellant confessedly did declare upon his application that he had never been convicted of crime, when the truth was that he had pleaded guilty of petit larceny and suffered a judgment of fine therefor. It is not for us to say that, upon the evidence disclosed, this could have been regarded as a peccadillo; the

fact is established and its quality as well as its consequences were for the board. So, too, it is unquestioned that he had for over three years failed and neglected to file his official bond, thus displaying, if the board so chose to regard his action, a neglect of duty and an indifference to the provisions of the law in that behalf. Finally, he did purchase and realize upon the city [4] warrant referred to in the charge, and this, because it is a crime punishable by disqualification from holding office (Rev. Codes, secs. 371, 8182), is a manifestation almost conclusive of that negligence and indifference to official propriety which the examining and trial board was in duty bound to notice. The contention is made that O'Brien was not an officer within the meaning of these sections and that the circumstances of his act removed it from any purpose which the sections were intended to serve; but neither position is tenable. O'Brien was an officer (*State ex rel. Quintin v. Edwards*, 38 Mont. 250, 99 Pac. 940; *Peterson v. City of Butte*, 44 Mont. 401, 409, Ann. Cas. 1913B, 538, 120 Pac. 483); and application of the sections cannot be avoided by any plea of accommodation to a brother officer, particularly where the accommodator did not disdain to accept the interest accrued when the warrant was collected.

Of the other specifications we say nothing because the record affords room for divergence of opinion. We should hesitate to impute immorality or cowardice to Mr. O'Brien upon what is before us; but there is nothing to show that the board did so, and as the evidence suffices in other respects, we think the district court was correct in its refusal to interfere. The judgment appealed from is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

HERZIG, RESPONDENT, v. SANDBERG ET AL., APPELLANTS.

(No. 3,889.)

(Submitted March 12, 1918. Decided April 6, 1918.)

[172 Pac. 132.]

*Personal Injuries—Automobiles—Negligence—Failure of Proof
—Cross-examination—Intoxication—Offer of Proof.***Personal Injuries—Automobiles—Negligence—Failure of Proof.**

1. Where the evidence of defendants, charged with negligence in failing to keep a lookout for pedestrians while driving an automobile and omitting to give warning of the approach of their car, was uncontradicted that they saw plaintiff when it was a hundred feet or more away from him, and plaintiff himself testified that he saw the car approaching ten or fifteen minutes before he was struck and knew it was drawing steadily nearer, the charges of negligence above referred to should have been withdrawn from the jury.

Same—Cross-examination—Intoxication.

2. Plaintiff having stated, among other things, that in his opinion an automobile was driven at the rate of forty miles an hour at the time it struck him, it was error to refuse permission to cross-examine him whether at that time he was intoxicated, testimony as to his condition in this respect shedding light upon his capacity for accurate observation, correct memory and unbiased judgment.

Same—Cross-examination—Improper Refusal.

3. If a question put to a witness was within the legitimate range of cross-examination, the fact that it was also proper in support of defendant's case was no justification of the court's refusal to permit it to be asked.

Same—Cross-examination—Intoxication—Contributory Negligence.

4. Evidence of intoxication was also admissible in support of the defense of contributory negligence pleaded in the answer.

[As to intoxication as contributory negligence, see note in 25 Am. St. Rep. 39.]

Trial Practice—Offer of Proof—When Rule Inapplicable.

5. The rule which requires an offer of proof to be made before refusal to admit evidence may be considered error has no application to cross-examination, nor to direct examination where the questions themselves indicate clearly the evidence intended to be elicited.

Appeals from District Court, Silver Bow County; John B. McClernan, Judge.

ACTION by A. J. Herzig against A. C. and Annabell Sandberg. From a judgment for plaintiff and an order denying them a new trial, defendants appeal. Reversed and remanded.

On reciprocal duty of operator of automobile and pedestrian to use care, see notes in 38 L. R. A. (n. s.) 487; 42 L. R. A. (n. s.) 1178; 51 L. R. A. (n. s.) 990.

Mr. Jas. M. Brinson, for Appellants, submitted a brief and argued the cause orally.

Citing upon the question that it was error to deny the right to cross-examine plaintiff whether or not he had been drinking during the afternoon of the accident: *People v. Eastwood*, 14 N. Y. 562; *Commonwealth v. Sturtivant*, 117 Mass. 122, 134, 19 Am. Rep. 401; *Edwards v. Worcester*, 172 Mass. 105, 51 N. E. 447; *McFern v. Gardner*, 121 Mo. App. 1, 11, 97 S. W. 972; *Wabash R. R. Co. v. Prast*, 101 Ill. App. 167; *Philadelphia City Pass. Ry. Co. v. Henrice*, 92 Pa. St. 431, 37 Am. Rep. 699; *Schafer v. Gilmer*, 13 Nev. 330, 40 L. R. A. 143, and cases cited; *McPhee v. Scully*, 163 Mass. 216, 219, 39 N. E. 1007; *Brooks' Street Railway Law*, 320; *Abbott's Trial Brief*, 441; *Moore on Facts*, 385.

Mr. Joseph H. Griffin, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Plaintiff was injured by being struck by an automobile. He charges the defendants with negligence in the following particulars: A. Failing to keep a lookout. B. Running the car at unreasonable speed. C. Violating the law of the road. D. Failing to give warning of the approach of the car. Issues were joined and the cause tried, resulting in a judgment for plaintiff. Defendants appealed from the judgment and from an order denying them a new trial.

The charges of negligence A and D should have been withdrawn from the jury's consideration, as there was not any [1] evidence to support either; that is to say, the evidence is uncontradicted that defendants, their driver and two other occupants of the car all saw plaintiff when the car was a hundred feet or more from him, while the testimony of the plaintiff himself is that he saw the car approaching ten or fifteen minutes

before he was struck and during that time appreciated the fact that it was drawing nearer and nearer. He had all the notice that any warning could give, and if there was a failure to give warning, it could not have been a proximate cause of his injury.

In support of the other charges, plaintiff testified that in his [2] opinion the car was driven at the rate of forty miles per hour at the time of the accident; that he was walking near the right-hand side of the road, going north; that the driver of the car undertook to pass to his right instead of to his left; that the intervening space was not sufficiently wide for the purpose, and that by reason of this violation of the law of the road the collision occurred. On cross-examination counsel for defendants sought to show that at the time of the accident plaintiff was intoxicated. Upon objection, the court refused to permit the investigation, and when defendants attempted to prove the same fact in their case in chief, they were met by the same ruling. In each instance the court erred.

1. The evidence was proper as a part of plaintiff's cross-examination. It is always permissible on cross-examination of a witness to test the accuracy of his knowledge or the completeness or distinctness of his recollection; to ascertain the source of his information, his opportunity for accurate observation, and his general acquaintanceship with the subject to which his direct examination relates. If he has made an estimate or given an opinion, he may be cross-examined for the purpose of shedding light upon the reasonableness of his estimate or the basis of his opinion. (1 Greenleaf on Evidence, sec. 446.) These rules are elementary (40 Cyc. 2675), are fully comprehended within the terms of section 8021, Revised Codes, and should be invoked liberally, rather than restricted. (*Kipp v. Silverman*, 25 Mont. 296, 64 Pac. 884; *State v. Biggs*, 45 Mont. 400, 123 Pac. 410; *Cuerth v. Arbogast*, 48 Mont. 209, 136 Pac. 383.)

It is too well settled to be open to controversy that intoxication deadens the sensibilities, and therefore evidence that a witness was intoxicated at the time to which his testimony relates reflects upon his capacity for accurate observation, correct

memory and unbiased judgment. (17 Cyc. 787; 40 Cyc. 2574.)

[3] It is no objection to say that the evidence, if produced, would have tended to make out defendants' special defense. If the question was within the legitimate range of cross-examination, it was none the less so that it was also proper in support of defendants' case.

2. The evidence was admissible under the general denials of the answer. If it could have been shown that at the time of the accident, plaintiff was intoxicated to such a degree that his opinion as to the rate the car was running was worthless, and that his condition was such that he could not have known or appreciated what actually occurred, the *prima facie* case made out by his direct testimony, would have been overcome. It would be a singular rule of law which would deny to defendants the right to challenge the credibility of the plaintiff. To illustrate: If at the time of the accident plaintiff was asleep or unconscious and therefore unable to know the facts to which he testified, it would certainly be competent to show it, and for the same reason it was proper to show that he was intoxicated, if such was the fact. (2 Wigmore on Evidence, sec. 933; *Joyce v. Parkhurst*, 150 Mass. 243, 22 N. E. 899; *Schneider v. Great Northern R. Co.*, 47 Wash. 45, 91 Pac. 565; *Green v. State*, 53 Tex. Crim. 490, 22 L. R. A. (n. s.) 706, 110 S. W. 920; *Pollock v. State*, 136 Wis. 136, 116 N. W. 851; *Pittsburgh, C. C. & St. L. R. Co. v. O'Conner*, 171 Ind. 686, 85 N. E. 969.)

3. The evidence was also admissible in support of the defense [4] of contributory negligence pleaded in the answer. If the plaintiff was intoxicated, that fact did not operate to relieve him from the necessity of exercising the ordinary care for his own safety which the law imposes upon a sober man. While his intoxication alone would not necessarily bar his right of recovery, it was a circumstance to be considered in determining whether he was guilty of contributory negligence. (29 Cyc. 534, 620.)

It is insisted, however, that defendants may not avail [5] themselves of these erroneous rulings, because they failed

to make an offer of proof. The rule which requires that an offer of proof be made has no application to cross-examination. (*State v. Wakely*, 43 Mont. 427, 117 Pac. 95; *Cunningham v. Austin & N. W. Ry. Co.*, 88 Tex. 534, 31 S. W. 629; *Martin v. Elden*, 32 Ohio St. 282.) Neither has it any application to direct examination where the questions themselves indicate clearly the evidence intended to be elicited. (*First Nat. Bank v. Carroll*, 35 Mont. 302, 88 Pac. 1012; *Buckstaff v. Russell & Co.*, 151 U. S. 626, 38 L. Ed. 292, 14 Sup. Ct. Rep. 448.)

This case emphasizes the distinction between an erroneous ruling admitting incompetent evidence and a like error excluding competent evidence. In the first instance we might be able to say that the error was harmless, but no one can say what effect material evidence excluded might have had if before the jury for consideration.

The judgment and order are reversed and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

UNITED STATES NAT. BANK OF RED LODGE, RESPOND-
ENT, v. SHUPAK ET AL., APPELLANTS.

(No. 3,891.)

(Submitted March 13, 1918. Decided April 8, 1918.)

[172 Pac. 324.]

Negotiable Instruments—Demand Notes—Presentment—“Maturity”—Banks and Banking—Agency—Checks.

Negotiable Instruments Law—Character of Act.

1. The provisions of the Negotiable Instruments Law (sec. 5842 *et seq.*, Rev. Codes) deal with negotiable instruments, and not with instruments non-negotiable in character.

Negotiable Instruments—Demand Notes—Presentment.

2. Presentment for payment is not necessary to charge the makers of a demand note payable at a particular place.

Same—Delay in Bringing Action—When not Defense.

3. Plaintiff's delay in bringing action on a negotiable promissory note or failure to present it for payment at an earlier date than it did was no defense so long as the action was brought within the period of the statute of limitations.

Same—Tender of Payment—Statutes.

4. *Held*, that section 5918, Revised Codes, providing that where a note is by its terms payable at a special place and the maker is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment by him, has no application to a demand note.

Same—"Maturity."

5. "Maturity" of a note within the meaning of section 5918, Revised Codes, is the time when a note or bill becomes due.

Same—Maturity—Date of, How not Determined.

6. Where the makers of a demand note did not keep money on deposit in a bank to meet it, but increased or diminished the deposit as the exigencies of their business permitted or required, they could not select a particular date at which their balance was sufficient to meet it and insist that the note matured at that particular time.

Same—Banks—Agency.

7. *Held*, that section 5935, Revised Codes, providing that an instrument made payable at a bank is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon, creates the bank the agent of the maker and does not authorize it to receive payment for the holder.

Same—Banks—Collections—Duty of Agent.

8. A bank which undertakes to collect commercial paper for a customer must, in the exercise of common prudence and ordinary care, select as a subagent someone other than the party who is to make payment.

[As to liability of banks as agents for collection, see note in 34 Am. Dec. 307.]

Same.

9. The above rule (paragraph 8) *held* inapplicable where the bank undertaking to collect on a note was acting for itself and the bank to which it was sent was not expected to pay it, two of its directors being the makers thereof.

Same—Collections—Payment in Money—Duty of Agent.

10. An agent has no implied authority to accept payment in anything but money.

Same—Checks—When Payment—When not.

11. A check not being money but merely an order for money its acceptance by an agent in discharge of an indebtedness is conditional upon its payment, in the absence of an agreement to the contrary.

Same—Worthless Checks—Payment.

12. Giving a check which is worthless because drawn upon an insolvent bank does not pay a debt.

Appeals from District Court, Carbon County; A. C. Spencer, Judge.

ACTION by the United States National Bank of Red Lodge, Montana, against Harry Shupak and Joe Kuchinski, copartners

as Shupak & Kuchinski. From a judgment in favor of plaintiff and an order denying their motion for a new trial, defendants appeal. Affirmed.

Messrs. Goddard & Clark, Mr. E. B. Merrill and Mr. R. G. Wiggernhorn, for Appellants, submitted a brief; *Mr. O. F. Goddard* argued the cause orally.

Messrs. Johnston & Coleman and Mr. John G. Skinner, for Respondent, submitted a brief; *M. W. M. Johnston* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In August, 1913, Harry Shupak and Joe Kuchinski executed and delivered to the Bridger State Bank their promissory note for \$5,000. On the day following, the Bridger bank for value indorsed and transferred the note to the United States National Bank of Red Lodge. In April, 1914, the Red Lodge bank sent the note to the Bridger bank for collection. In June the Bridger bank sent what purported to be a note renewing the former one, but which was in fact a forgery. The genuine note was retained by the Bridger bank until January 21, 1915, when it was presented to the makers for payment. They gave their check on the Bridger bank for the amount of the principal and interest, and received their note. On January 30, 1915, the Bridger bank failed and the state examiner took charge. Later a receiver was appointed and numerous forgeries by Hough, the president of the Bridger bank, including the one above, were discovered. At the time the genuine note was delivered up to the makers, they had to their credit on the books of the Bridger bank a sum in excess of the amount of the check which they gave in payment of the note, but the bank itself was then insolvent and did not have funds in its vaults and with its correspondents sufficient to pay the check, and no attempt was made to charge the check to their account or to enter it upon the books

of the bank. Shupak and Kuchinski were directors of the Bridger bank, and Kuchinski was its vice-president. This action was brought by the Red Lodge bank to enforce payment of the genuine note. At the conclusion of the trial the court below directed a verdict for plaintiff, and from the judgment entered thereon and from an order denying them a new trial, defendants appealed.

1. It is insisted by appellants that the note is non-negotiable. If we assume that it is and that the Red Lodge bank took it subject to the equities and defenses existing in favor of the makers at the time of the transfer, these defendants then might interpose any defense to this action which they had against the Bridger bank on August 22, 1913. (*Cornish v. Woolverton*, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4; *Buhler v. Loftus*, 53 Mont. 546, 165 Pac. 601.) But defendants plead no such defenses; on the contrary, their testimony discloses that they received full value for the note and that they had no defense against it at that time.

If we should accept appellants' contention that the note is non-negotiable, the foregoing discussion would be conclusive, for their further argument based upon certain sections of our [1] Negotiable Instrument Law would have no pertinency whatever. The provisions of that Act deal with *negotiable* instruments, not with instruments non-negotiable. (3 R. C. L. 1172.)

2. We are of the opinion, however, that the note is negotiable. By its terms it is payable on demand, and appellants insist that plaintiff was guilty of negligence in failing to present it for payment within a reasonable time and that the negligence worked prejudice to them, since they were ready, able and willing to pay it long before the Bridger bank failed. By this action [2] plaintiff does not seek to hold anyone but the makers—the parties primarily liable for the payment of the note, and as to them presentment was not necessary.

3. Section 5918, Revised Codes (The Uniform Negotiable Instrument Act), provides: "Presentment for payment is not neces-

sary in order to charge the person primarily liable on the instrument, * * * But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and endorsers." (8 C. J. 529; 7 Cyc. 963.) This section defines the purpose of presentment and is not modified by subsequent sections. Section 5919 specifies the time within which presentment must be made in order to charge those secondarily liable, and 5920 indicates what constitutes such presentment. The rule that presentment for payment is not necessary to charge the makers applies equally to a demand note payable at a particular place. (*Farmers' Nat. Bank v. Venner*, 192 Mass. 531, 5 Ann. Cas. 690, 78 N. E. 540.)

So long as this action was brought within the period of the [3] statute of limitations, defendants cannot claim exemption from liability by reason of plaintiff's failure to present it for payment or commence this action at an earlier date.

Section 5918, Revised Codes, further provides: "If the [4] instrument is by its terms payable at a special place and he [maker] is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part." This provision, we think, can have no application to a demand note which "admits a present debt to be due to payee or holder, is payable absolutely and at all events and requires no other or previous demand than the institution of [5] a suit thereon." (*McFarland v. Cutter*, 1 Mont. 383.) "Maturity," as used in this provision, means the time when a note or bill becomes due. (Bouvier's Law Dictionary; Black's Law Dictionary; *Gilbert v. Sprague*, 88 Ill. App. 508.) It does not seem reasonable that the provision above contemplates that a man will borrow money on a demand note only to keep it on hand to meet the note which evidences his debt. But for a stronger reason the provision cannot be invoked in this instance.

The note being due on demand was payable as soon as issued [6] (7 Cyc. 848); but it was not until January 8, 1914, that defendants had to their credit in the Bridger bank, funds suffi-

cient to meet it. Thereafter from April 15 to June 20; from July 30 to September 8; and from September 28 to December 23, in 1914, this balance was not sufficient. In other words, they did not keep money on deposit to meet this note but increased or diminished their deposit as the exigencies of their business permitted or required. They cannot select a particular date upon which their balance was sufficient and insist that the note matured at that particular time.

The note in question was by its terms payable at the Bridger [7] bank, and defendants insist that in failing to charge the note to their account whenever they had funds sufficient to meet it, the Bridger bank was guilty of negligence which is imputable to plaintiff. Section 5935, Revised Codes, provides: "Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon." The authorities which have construed this section of the Uniform Negotiable Instruments Law are quite generally agreed that it merely creates the bank the agent of the *maker* and does not authorize it to receive payment for the holder. (8 C. J. 602; 3 R. C. L. 1289.) The duty which the bank owes to the maker arises from the relation of debtor and creditor, and not from the fact that it is the agent of the holder.

It is insisted, also, that the Red Lodge bank was guilty of [8] negligence in selecting the Bridger bank as its collecting agent, because the note was payable at that bank. We approve the rule, so often stated by the courts, that a bank which undertakes to collect commercial paper for its customer, must, in the exercise of common prudence and ordinary care, select as a sub-agent someone other than the party who is to make payment. (*German Nat. Bank v. Burns*, 12 Colo. 539, 13 Am. St. Rep. 247, 21 Pac. 714.) The rule cannot have any application here, for [9] two reasons: (a) The Red Lodge bank was acting for itself as the owner and holder of the note and owed no duty to anyone; (b) the Bridger bank was not interested in the note and was not expected to pay it. It was merely the agent of the

Red Lodge bank to collect the note from the makers who were responsible.

4. Defendants cannot insist that by giving their check on the Bridger bank they paid this note.

(a) It is elementary that an agent has no implied authority [10, 11] to accept payment in anything but money. (3 R. C. L. 1284.) A check is merely an order for money and in the absence of any agreement to the contrary, its acceptance in discharge of an indebtedness is conditional upon its payment. (8 C. J. 568; Eaton & Gilbert on Commercial Paper, 538; Daniels on Negotiable Instruments, 6th ed., sec. 1623.) In *Taylor v. Wilson*, 11 Met. (52 Mass.) 44, 45 Am. Dec. 180, it is said: "A check is merely evidence of a debt due from the drawer. Whether it shall operate as payment or not depends on two facts; first, that the drawer has funds to his credit in the bank upon which it is drawn; and second, that the bank is solvent, or, in other words, pays its bills and the checks duly drawn upon it, on demand. The receipt of a check, therefore, before presentment, if there is no laches on the part of the holder, is not payment of the debt for which it is delivered."

(b) At the time defendants gave their check, it was worthless, because of the insolvency of the Bridger bank. It could not be paid and by giving it, defendants did not part with anything [12] of value or alter their situation to their prejudice. Giving a worthless check does not pay a debt.

5. None of the special defenses pleaded can be maintained.

Recurring to the questions already determined,—that presentment was not necessary in order to bind the makers, and that plaintiff's delay in commencing the action constitutes no defense,—let us assume that the Red Lodge bank had sent this note for collection to a responsible third party, who presented it for payment on January 21, 1915, received defendants' check on the Bridger bank, which was dishonored when presented—as it would have been—the situation of defendants could not have been different from what it is; so that the employment of

the Bridger bank as the collecting agent could not have operated to the defendants' prejudice.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

ST. PAUL MACHINERY MFG. CO., RESPONDENT, v. BRUCE
ET AL., APPELLANTS.

(No. 3,887.)

(Submitted March 11, 1918. Decided April 13, 1918.)

[172 Pac. 330.]

*Partnership — Evidences of Existence — Formation — Intent —
Common Property — Profit-sharing — Sales — Failure of Con-
sideration — Breaches of Warranty.*

Appeal and Error—Directed Verdict—Question Determinable.

1. Where a judgment is based on a directed verdict, the question on appeal is, not whether the inferences necessary to maintain the court's action are permissible from the evidence, but whether they are commanded by it.

Partnership—Evidence—Insufficiency—Directed Verdict—Error.

2. Evidence *held* sufficient to permit the inference of the existence of a partnership, but insufficient to command such inference, and that therefore the court erred in directing a verdict in favor of plaintiff, who sought to hold defendants as copartners for the cost price of farming machinery.

Same—Formation—Intent.

3. No one who has not held himself out as a partner is liable as such unless he is a partner in fact, and whether he is such in fact is a question of intent.

Same—Presence or Absence of Term "Partnership" in Agreement—Effect.

4. Though the use of the word "partnership" in an agreement by individuals to enter into a common enterprise is not decisive, its presence or absence is evidence of considerable value in determining the relationship intended to be created.

Same—Common Property—Right of Disposition.

5. Where none of the persons alleged to have constituted a farming partnership had any power to dispose of the interests of the others in the land intended to be farmed, such land could not constitute the partnership fund or common property.

Same—Profit-sharing.

6. Profit-sharing is persuasive of the existence of a partnership.

[As to when agreements to share profits do not create partnership, see note in 30 Am. St. Rep. 828.]

Sales—Failure of Consideration—Breaches of Warranty—Availability of Defenses.

7. The rules that failure of consideration cannot be raised by one who accepts and retains property sold, and that breaches of warranty after acceptance cannot be urged as a defense but only as counterclaims, apply only where the acceptance was unqualified or unconditional.

Pleading—Inconsistent Defenses—Admissibility of Evidence.

8. Since a defendant may, under section 6549, Revised Codes, interpose illogical or inconsistent defenses, it is error to exclude evidence offered in support thereof.

Appeal from District Court, Lewis and Clark County in the First Judicial District; R. Lee McCulloch, a Judge of the Fourth District, presiding.

ACTION by the St. Paul Machinery Manufacturing Company against A. C. Bruce, E. C. Parker and F. J. Edwards, doing business as the Confederate Creek Farm. Judgment for plaintiff. Defendant Edwards appeals from an order denying him a new trial. Reversed.

Mr. Edward Horsky and Mr. C. W. Wiley, for Appellant F. J. Edwards, submitted a brief and argued the cause orally.

The contract here involved was in escrow, of an executory nature, and there was to be no sharing of crops or proceeds thereof until Parker and Bruce had performed the conditions of the escrow agreement, viz., paid off the mortgage and all other indebtedness, developed the land and fulfilled all other conditions. An agreement to become partners *in futuro* does not constitute a partnership. A case squarely in point is *Cudahy Packing Co. v. Hibou*, 92 Miss. 234, 46 South. 73, 18 L. R. A. (n. s.) 975. (See, also, *State v. Mendenhall*, 24 Wash. 12, 63 Pac. 1109; *Hoile v. York*, 27 Wis. 209; *Holgate v. Downer*, 8 Wyo. 334, 57 Pac. 918; *Davis v. Key*, 123 U. S. 79, 31 L. Ed. 112, 8 Sup. Ct. Rep. 55.)

Persons who contribute property or funds for a common object and agree to share the returns are not thereby rendered

partners, as they have no common stock or capital, and no community of interest as principals of and agents for each other in the business. (*Champion v. Bostwick*, 18 Wend. (N. Y.) 175, 31 Am. Dec. 376; *Quackenbush v. Sawyer*, 54 Cal. 439; *Beecher v. Bush*, 45 Mich. 188, 40 Am. Rep. 465, 7 N. W. 785; *McDonnell v. Battle House Co.*, 67 Ala. 90, 42 Am. Rep. 99; *Cutler v. Winsor*, 6 Pick. (23 Mass.) 335, 17 Am. Dec. 385.) Arrangements for farming on shares are presumed not to create partnerships. (30 Cyc. 369; *Randle v. State*, 49 Ala. 14; *Romero v. Dalton*, 2 Ariz. 210, 11 Pac. 863; *Smith v. Summerlin*, 48 Ga. 425; *Holloway v. Brinkley*, 42 Ga. 226; *Shrum v. Simpson*, 155 Ind. 160, 49 L. R. A. 792, 57 N. E. 708; *Rose v. Buscher*, 80 Md. 225, 30 Atl. 637; *Donnell v. Harshe*, 67 Mo. 170.)

The evidence showed conclusively that the machine was worthless and an utter loss. Lawson on Rights and Remedies, section 2264, says: "Total failure of consideration is a good defense to a suit upon a contract." (See *Waldorf v. Phillips*, 42 Mont. 80, 111 Pac. 546; *Dickinson v. Hall*, 14 Pick. (31 Mass.) 217, 25 Am. Dec. 390; *Harrington v. Stratton*, 22 Pick. (39 Mass.) 510, 513.)

A member of an uncommercial partnership, as, for instance, an ordinary partnership, for planting or farming, does not have the power to bind his copartner by making a promissory note in the partnership name. (2 Lawson on Rights & Remedies, sec. 646; *McCrary v. Slaughter*, 58 Ala. 230; *Peterson v. Armstrong*, 24 Utah, 96, 66 Pac. 767; *Gutheil v. Gilmer*, 23 Utah, 84, 63 Pac. 817; *Cavanaugh v. Salisbury*, 22 Utah, 465, 63 Pac. 39.)

Messrs. Day & Mapes, for Respondent, submitted a brief; *Mr. E. C. Day* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Action by the respondent against "A. C. Bruce, F. C. Parker and F. J. Edwards, partners doing business under the firm name and style of the Confederate Creek Farm," to recover the contract price of a certain tractor sold by the respondent to the

Confederate Creek Farm. Bruce and Parker were not served but issue was joined by the defendant Edwards, who denied the partnership and alleged that the tractor was so deficient as to amount to failure of consideration and to such breaches of warranty as would defeat the right to recover the price. The court directed a verdict for the respondent and against Edwards, and he appeals from an order denying him a new trial. It is to be [1] noticed that since the verdict upon which the judgment stands was a directed one, the question is not whether the inferences necessary to maintain the respondent's case were from the evidence permissible, but whether they were necessary.

1. To support the issue of partnership the respondent presented these facts:

(a) On April 11, 1912, Edwards executed a deed conveying [2] to Bruce and Parker an undivided one-sixth interest in and to certain real estate in Broadwater county, and signed a mutual option contract by which he should be privileged to repurchase said interest or they should be privileged to acquire an additional interest in said property up to "forty per cent" thereof; at the same time an agreement was entered into which recites the existence of said property, the ownership by Bruce and Parker of an undivided one-sixth interest therein and by Edwards of an undivided five-sixths interest therein, the existence upon the land of certain personal property similarly owned, a purpose on the part of "all the owners * * * to develop such property and * * * to farm said lands in a farmerlike manner," and stipulates: that the money "necessary for the contemplated development and operation of said property" shall be borrowed, or raised on mortgage to be executed by Edwards and wife; that all the obligations incurred in such "development and operation" shall be paid before there is any division of profits; that such "development and operation" shall be in charge of Parker, who shall give all his time and best efforts to the enterprise and receive a monthly compensation to be charged to the cost of such "development and operation"; that all machinery, implements and personal property bought

for the "development and operation" of said real estate shall belong thereto and be owned by the parties in proportion to their respective interests therein; that after all obligations are paid, the remainder of the proceeds or profits shall be divided—one-half to Edwards and one-half to Bruce and Parker.

(b) The sum of \$6,000 for the carrying out of the project was borrowed from the Union Bank & Trust Company of Helena, upon notes signed by Edwards, Bruce and Parker; thereafter it was ascertained that additional funds to the extent of \$2,000 would be needed, making in all \$8,000, and it was then agreed that Edwards should obtain the total sum from the Montana Life Insurance Company on mortgage of the real estate executed by Edwards and wife, with which moneys the notes to the Union Bank & Trust Company should be taken up and the balance applied to operating costs, all of which was done; Bruce and Parker had by this time paid the consideration for the deed, but apparently the latter had not been delivered, for the agreements and the deed were on July 22, 1912, placed in escrow with a stipulation that the deed should be delivered upon payment of the mortgage obligation to the insurance company.

(c) The moneys procured for the development and operation of the property were carried in an account at the Union Bank in the name of the Confederate Creek Farm; Parker repaired to the lands and proceeded to carry on operations, plowing, seeding, buying machinery and otherwise going forward with the work; payments for current expense were made by check in the name of the Confederate Creek Farm, by Parker as manager; on two occasions Edwards at Parker's request participated in the conduct of the concern—at one time buying seed potatoes, and at another buying a packer.

(d) On July 24, 1912, Bruce and Parker ordered from the respondent a tractor, agreeing in the name of the Confederate Creek Farm to pay for it; the tractor was sent, tried and retained, but not paid for; the development of the property did not prove a success, and neither Bruce nor Parker returned to the premises after December 19, 1912.

That we have here sufficient of the *indicia* of partnership to permit the inference of its existence cannot be doubted; but whether they command that inference is a different matter, especially when viewed in the light of all the evidence. No one [3] who has not held himself out as a partner is liable as such unless he is a partner in fact (Rev. Codes, sec. 5492), and whether he is such in fact is a question of intent. (*Parchen v. Anderson*, 5 Mont. 438, 446, 51 Am. Rep. 65, 5 Pac. 588; *McCormick v. Stimson*, ante, p. 272, 169 Pac. 726.) In none of the [4] agreements is the word "partnership" to be found. This, of course, is not decisive, for while an agreement by individuals to enter into a common enterprise does not necessarily create a partnership, even though that term be given to the association by the agreement itself, and while, on the other hand, a partnership may be the nature of an association, even though the parties say in their agreement that such is not their purpose (*Beecher v. Bush*, 45 Mich. 188, 193, 40 Am. Rep. 465, 7 N. W. 785, quoted in *Parchen v. Anderson*, supra), still the presence or absence of a term so aptly characteristic is evidence of considerable value in determining the relationship intended to be created. Again, the existence of a partnership fund or common [5] property is by no means established in this case beyond debate. Certainly such a fund is not to be seen in the land, as respondent insists, because none of the parties had any power or right of disposition over the interests of the others or beyond their own respective interests, specifically defined. (*Weiss v. Hamilton*, 40 Mont. 99, 105 Pac. 74.) Was it in the money raised for the purpose of carrying on the intended operations? The respondent does not so contend, and it is notable that the machinery, implements and other property purchased with it were to "become a part of and belong to" the real estate, the tenure of which excludes the idea of partnership property. Finally, the fact that profits were to be shared is persuasive [6] only. (*Parchen v. Anderson*, supra; *Beasley v. Berry*, 33 Mont. 477, 84 Pac. 791; *Flathead County State Bank v. Ingham*, 51 Mont. 438, 153 Pac. 1005.) Many agreements exist which

contemplate a division of profits but which are not partnerships. One of these is exhibited in *Flathead County State Bank v. Ingham*, just cited, the features of which are not essentially different from those presented here. Indeed, in the absence of any language constituting that mutual agency so necessary to a partnership (*Parchen v. Anderson, supra; Croft v. Bain*, 49 Mont. 484, 143 Pac. 960), the situation in the two cases is the same; and if we substitute Edwards for Ingham, Bruce and Parker for Jones, and farming for horse-raising, the resemblance is absolute, save for the fact that Ingham honored drafts and thus created the fund to carry on that enterprise, whereas here the fund necessary to conduct the farming operations was ultimately raised by mortgage upon the land, which mortgage—or the indebtedness secured thereby—it was expressly stipulated must be fully paid before any profit-sharing should occur.

Concerning the actions of Edwards to aid the enterprise after it was launched, the evidence is conflicting; but if he did what the respondent asserts, the actions in themselves were colorless, and their significance depends upon the agreements which it is supposed they were designed to forward. The weakness of his case consists in the absence of any definite declaration that he had no intention to form a partnership; but he shows enough to present that attitude; he denies knowledge of the use of the name Confederate Creek Farm to describe any partnership or account; he supposed that when the papers were signed and the moneys procured, that was all he had to do with the matter, and he never went upon the premises which, as he claims, Bruce and Parker were to farm and develop. On the whole evidence, therefore, we feel compelled to say that the question of partnership was for the jury.

2. Nor, in our opinion, was the evidence touching the sale of the tractor such as to command a directed verdict; for the effect of the ruling was to exclude failure of consideration and breaches of warranty from the case. It can be justified—assuming the partnership—only upon the view that failure of [7] consideration cannot be raised by one who accepts and

retains property sold, and that breaches of warranty after acceptance cannot be urged as a defense but only as a counter-claim. These propositions are correct (*Best Mfg. Co. v. Hutton*, 49 Mont. 78, 141 Pac. 653); but their application depends upon the existence of an unqualified or unconditional acceptance, and the acceptance here was not of that character. If it amounted to anything more than the final closure of an agreement to purchase the tractor, it was clearly subject to the warranty implied by law and to the guaranty expressed in the contract, which was to be for one year. This is the situation suggested by the evidence actually admitted. But here the appellant complains that the trial court excluded evidence which would have made a verdict by direction unthinkable. The evidence so offered discloses that after the purchase, or what is called the acceptance, the respondent made persistent efforts and repeated promises to rectify and make effective the machine, found to be seriously deficient; it tended to show that the so-called acceptance was regarded by purchaser and seller alike as a conditional one, and that the seller had waived the benefit of those terms of the contract in virtue of which the retention of the tractor would amount to an acceptance. It is manifest that a case made up of this excluded evidence and the evidence actually admitted would be an altogether different one from that presented in either *Berlin Machine Works v. Midland Coal & Lumber Co.*, 45 Mont. 390, 123 Pac. 396, or *Best Mfg. Co. v. Hutton*, *supra*, relied on as justifying the rulings. One of the reasons indicated for the exclusion of much of this evidence is that unless the appellant was a partner as alleged in the complaint, it was none of his business whether the consideration failed or breaches of warranty occurred. This view is logical and at the proper stage of the case was presentable to the jury by suitable instructions; but it could not authorize the exclusion of the evidence [8] because the appellant was entitled to deny the partnership and to plead the special defenses in his answer (Rev. Codes, sec. 6549; *O'Donnell v. City of Butte*, 4 Mont. 97, 119 Pac. 281),

leaving it to the jury to say whether either position had been maintained.

The order appealed from is reversed and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

BORGESON, RESPONDENT, v. TUBB, APPELLANT.

(No. 3,900.)

(Submitted March 13, 1918. Decided April 15, 1918.)

[172 Pac. 326.]

***Real Property—Quieting Title—Correction Deeds—Effect of
Acceptance—Boundaries—Title by Prescription.***

Real Property—Correction Deeds—Effect of Acceptance.

1. Where a grantee accepts and subsequently acts under a deed designed to correct a misdescription in a prior one, he elects to take whatever the correction deed calls for, and as against his grantor he surrenders all claim to what the original one described as effectually as though he had redeeded it.

Same—Boundaries—Practical Location by Parties—Estoppel.

2. Evidence *held* to show such a practical location of a boundary line between adjoining city lots, and acquiescence thereafter in the line so established, as to conclude the parties and their privies.

Same—Quieting Title—Burden of Proof.

3. In an action to quiet title, plaintiff must prevail upon the strength of his own case rather than upon the weakness of his adversary.

Same—Title by Prescription.

4. Where defendant and his predecessors had been in actual possession of a fractional lot for over twenty-five years, it was immaterial what kind of paper title he had; unless plaintiff could show a better one, defendant was entitled to prevail in an action to quiet title.

[As to creation of title by prescription, see notes in 14 Am. Dec. 67; 95 Am. St. Rep. 671.]

***Appeal from District Court, Fergus County; Roy E. Ayers,
Judge.***

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ACTION by Claus Borgeson against T. J. Tubb. Judgment for plaintiff and defendant appeals from an order denying him a new trial. Reversed.

Mr. E. K. Cheadle and *Mr. Chas. J. Marshall*, for Appellant, submitted a brief and argued the cause orally.

Messrs. Belden & De Kalb, for Respondent, submitted a brief; *Mr. O. W. Belden* argued the cause orally.

The things alleged as acts constituting adverse possession fall short in law of constituting adverse possession. (1) *Inclosures*. An inclosure of a smaller tract with a larger one not claimed adversely does not constitute a sufficient inclosure of the tracts to satisfy the law in this respect. (2 *Corpus Juris*, 64; *Walsh v. Hill*, 41 Cal. 571, 582; *Wolf v. Baldwin*, 19 Cal. 306; *Borel v. Rollins*, 30 Cal. 408; *Davis v. Spring Valley*, 57 Cal. 543, 546; *Polack v. McGrath*, 32 Cal. 15.) (2) *Sidewalks*. The building of a sidewalk is not an inclosure, and we do not think it is seriously contended that uncoupled with a fence, the fact of its existence would amount to anything. (3) *Taxes*. Unless expressly made so by a special statutory provision, the payment of taxes will not constitute and is not an element of adverse possession at all. We have no statute in Montana making it an element. (2 *Corpus Juris*, 203; 2 *Id.* 209.)

A correction deed was given, divesting title, if any had ever been acquired by Jutras, in fractional lot 1, in block 12, Janeaux Addition No. 1. Jutras accepted the deed, as is evidenced by its having been placed on record. Acceptance is presumed from the fact that a deed is recorded, and of dealing with the premises. (8 R. L. C. 1002, 1004; *Halluck v. Bush*, 2 Root (Conn.), 26, 1 Am. Dec. 60; *Peavey v. Tilton*, 18 N. H. 151, 45 Am. Dec. 365; *Dunlap v. Dunlap*, 94 Mich. 11, 53 N. W. 788; *Gould v. Day*, 94 U. S. 405, 24 L. Ed. 232.) Judras as well as those claiming under him were estopped. (2 Devlin on Deeds, sec. 850c; *Chloupek v. Perotka*, 89 Wis. 551, 46 Am. St. Rep. 858,

62 N. W. 537; *Emerick v. Alvarado*, 64 Cal. 529, 2 Pac. 418; *Fox v. Windes*, 127 Mo. 502, 48 Am. St. Rep. 648, 30 S. W. 323.)

When the correction deed was given and received after the platting of Janeaux Addition No. 1, it is apparent that it was the intention of all the parties, regardless of where the land came from, that lot 7 was to be a full lot. The senior survey controls. (5 Cyc. 930 (E); *Brown v. Milliman*, 119 Mich. 606, 78 N. W. 785; *Wilmarth v. Woodcock*, 66 Mich. 531, 33 N. W. 400; *Case v. Trapp*, 49 Mich. 59, 12 N. W. 908; *Albert v. Salem*, 39 Or. 466, 65 Pac. 1068, 66 Pac. 233; *Payne v. English*, 79 Cal. 540, 21 Pac. 952.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1882 Francis Janeaux laid out the southwest quarter of the northeast quarter of section 15, township 15 north, range 18 east, as the original town site of Lewistown and caused a plat thereof to be filed with the county clerk and recorder. In 1884 an amended plat was filed, the evident purpose of which was to supply certain necessary indorsements omitted from the first, but by inadvertence this amended plat erroneously described the forty-acre tract upon which the town site is located, and in 1890 a second amended plat was filed to correct the error. In 1885 Janeaux laid out Janeaux Addition No. 1 in the northwest quarter of the northeast quarter of section 15 above and caused a plat thereof to be filed. Upon the first plat of the original town site, block U 15 is represented as a quadrangle, though the block is not subdivided into lots. Upon each of the amended plats lot 7 of block U 15 is delineated as a full lot fronting fifty feet on Main street and extending back ninety feet. On the plat of Janeaux Addition there is shown a fractional lot marked 1, block 12, with a frontage of 29.2 feet on Main street, and it is this parcel which is the subject of dispute.

In 1886 Janeaux executed and delivered a deed by which he assumed to convey to Oliver Jutras "fractional lot 8" in block

U 15 of the original town site, and fractional lot 1 in block 12 of Janeaux Addition No. 1. In 1890 the personal representatives of Francis Janeaux, then deceased, acting under an order of court, executed and delivered to Jutras a deed "intended to correct a misdescription of said land contained in" the deed of 1886. This new deed recites that "the correct description of said lands so conveyed and intended to be conveyed is as follows: Lot seven in block U 15 on Main street, Lewistown, Fergus county, Montana." Counsel for both parties agree that this deed refers to lot 7, block U 15 of the original town site.

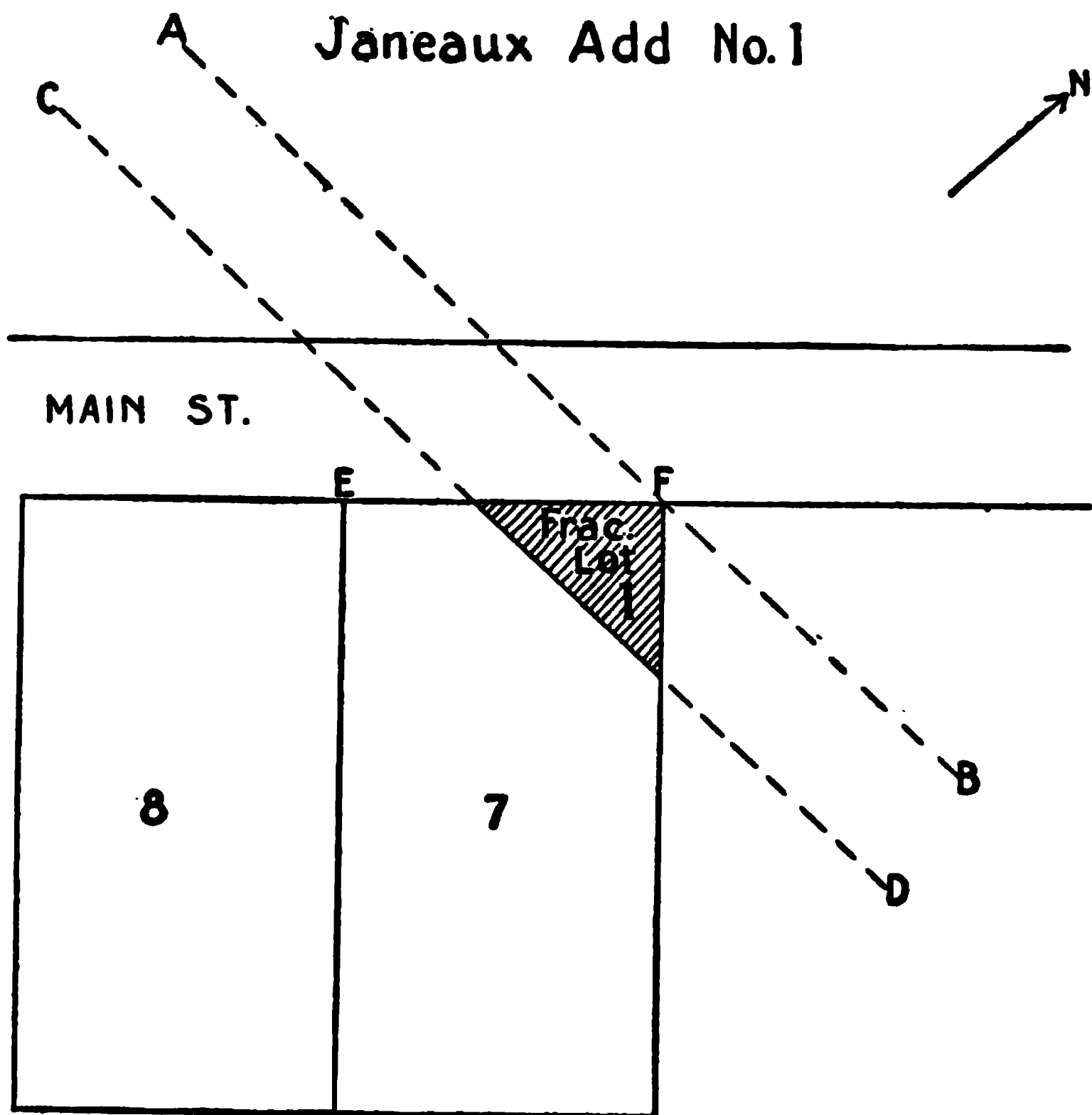
In 1893 Jutras mortgaged to Louis Landt lot 7, block U 15, of the original town site. This mortgage was foreclosed and in due course a sheriff's deed was executed to Landt for the land according to the description in the mortgage. Thereafter Landt sold the land to plaintiff Borgeson.

In 1903 Jutras executed and delivered a deed by which he assumed to convey to D. L. Walton fractional lot 1, block 12, Janeaux Addition No. 1, and in 1904 Walton by deed assumed to convey the same property to defendant Tubb.

This suit was brought to quiet title. Plaintiff alleges that he is the owner of lot 7, block U 15, of the original town site; that the lot has a frontage of fifty feet on Main street and extends back ninety feet, and that defendant asserts some adverse claim. Defendant by answer denied the material allegations of the complaint, alleged ownership of fractional lot 1, block 12, of Janeaux Addition No. 1, and that it is a part of the land described in plaintiff's complaint. Defendant further pleaded the bar of the statute of limitations and title by adverse possession to the land claimed by him. The reply put in issue all the new matter. The trial court found for plaintiff, and defendant appealed from an order denying him a new trial.

The original town site and Janeaux Addition No. 1 were laid out with streets and alleys running at an angle approximately 45 degrees from the true points of the compass. They lie in adjacent forties and it is apparent that it was the intention of Janeaux that the north line of the original town site should be

identical with the south line of the addition; but each of the plats was prepared by a different surveyor. According to the survey of the original town site as indicated by the plat, the north boundary line would be represented by the letters A-B on the subjoined diagram, whereas according to the plat of the addition that line would be represented by the letters C-D. If the line A-B correctly represents the true boundary between the two forties, then fraction lot 1 never existed except in the



Block U.15 Original Townsite

imagination of Janeaux and on the paper plat of the addition. If the line C-D correctly represents the division line, then lot 7, block U 15, of the original town site, has always been a frac-

tional lot with a frontage on Main street of 20.8 feet only, and fractional lot 1 in the addition exists in fact.

Plaintiff and defendant each relies upon title from Janeaux through a common source—Jutras—and the extent of the [1] interest acquired by Jutras depends, first, upon the effect to be given to the correction deed, and, second, upon the location of the boundary line. The deed of 1886 from Janeaux to Jutras described the land to be conveyed as fractional lot 1, block 12, in the addition, and fractional lot 8, block U 15, original town site. The correction deed reciting that its purpose was to correct a misdescription contained in the deed of 1886 declares that the property intended to be conveyed and which is conveyed is lot 7, block U 15, original town site.

We think the correct rule of law is stated concisely in 8 R. C. L. 1027, as follows: "Acceptance by a grantee of a deed of correction from his grantor in lieu of a prior deed misdescribing the land intended to be conveyed, constitutes an election by the grantee to take the land conveyed by the deed of correction, and a relinquishment of title to the land conveyed by the prior deed." (*Hall v. Wright*, 138 Ky. 71, Ann. Cas. 1912A, 1255, 127 S. W. 516; *Fox v. Windes*, 127 Mo. 502, 48 Am. St. Rep. 648, 30 S. W. 323.) In other words, by accepting and acting under the correction deed, Jutras elected to take lot 7, whatever it was in fact, in lieu of fractional lot 1 of the addition and fractional lot 8 of block U 15, and as against his grantor he surrendered all claim to fractional lot 1 as effectually as though he redeeded it. The title to lot 7 being in Jutras, Landt and his successor, Borgeson, succeeded to whatever property lot 7 describes, and whether it is a full lot 50x90 feet, or a fractional lot with only a frontage of 20.8 feet on Main street, depends primarily upon the correct location of the quarter-quarter section line dividing the original town site from the addition.

Since neither right claimed in this instance accrued between the time the plat of the original town site was filed and the date of filing the plat of the addition, we deem it unnecessary to consider whether Janeaux could, by filing the plat of the addition,

impeach the validity of the plat of the original town site or modify it to any extent.

The witness Tilzey testified that he made a survey and located [2] the line correctly and according to his testimony the boundary is represented by the line C-D. His testimony, though not conclusive, is uncontradicted. Janeaux, the original source of title, by his deed of 1886 and again by the correction deed of 1890, acknowledged the existence of fractional lot 1, and as a corollary, the correctness of the line C-D and that lot 7, original town site, was a fractional lot. Jutras likewise made the same acknowledgment by accepting those deeds. The evidence is uncontradicted that after Landt succeeded to the Jutras interest under the mortgage, Jutras maintained a fence for some years on the line C-D between fractional lot 1 in the addition and lot 7, and that on two or three occasions Landt tried to purchase fractional lot 1. About 1896 Jutras constructed a wooden sidewalk on the Main street frontage of fifty feet (between the letters E and F) for himself and Landt, and in settlement Landt paid upon the basis that he owned only two-fifths or twenty feet frontage, and so insistent was he to escape a greater burden that he actually counted the nails used in building the walk and weighed the nails bought but not used, to assure himself that he was not being charged for more than his just proportion of the costs. Later a concrete walk was laid in place of the wooden one, and again Landt paid for only two-fifths and Tubb for three-fifths of the whole. The same rule was observed in defraying the expense of sprinkling the street and keeping the sidewalk clean, and from 1890 Jutras and his successors have paid the taxes upon fractional lot 1. When Borgeson sought to purchase from Landt, a great deal of correspondence passed relating particularly to the quantity of land which was to be conveyed, with the result that Landt advised that Tubb's interest be purchased also, and refused to give a warranty deed or to convey lot 7 by metes and bounds as a full lot with a frontage of fifty feet on Main street.

Without entering upon a discussion of the question of adverse possession as a foundation of a claim of title in Jutras and his successors, this evidence, in the absence of anything to the contrary, is decisive that as between Jutras and Landt there was a practical location of the boundary line between lot 7 of the original town site and fractional lot 1 of the addition, and thereafter acquiescence in the line so established, which concludes them and their privies. (*Hoar v. Hennessy*, 29 Mont. 253, 74 Pac. 452; 9 Corpus Juris, 242-244; 4 R. C. L. 128-131.)

Though Jutras erroneously assumed that he owned fractional lot 1 after he received and accepted the correction deed, there is not any evidence that he intended to include it within the description of lot 7 when he executed and delivered the mortgage to Landt; on the contrary, the evidence is as nearly conclusive as it could well be, that neither mortgagor nor mortgagee understood that it was included. The conduct of Landt after he received the sheriff's deed admits of but one interpretation—that he did not claim fractional lot 1 and would not bear the financial burdens imposed upon it.

Since plaintiff must prevail, if at all, upon the strength of [3, 4] his own case rather than upon the weakness of his adversary, it is not material whether title to fractional lot 1 is in the Janeaux estate or whether defendant has any title whatever. He and his predecessors have been in actual possession of it from 1890 or earlier, and this of itself is sufficient to defeat the claim of anyone else who cannot show a better title. (*McCauley v. Ohenstein*, 44 Neb. 89, 62 N. W. 232; *Shelton Logging Co. v. Gosser*, 26 Wash. 126, 66 Pac. 151.)

The order is reversed and the cause is remanded, with direction to set aside the decree and dismiss the complaint.

Reversed

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

SCHEYTT, RESPONDENT, v. GALLATIN VALLEY MILLING
CO., APPELLANT.

(No. 3,893.)

(Submitted March 14, 1918. Decided April 16, 1918.)

[172 Pac. 321.]

*Personal Injuries—Master and Servant—Negligence—Evidence
—Insufficiency—Res Ipsa Loquitur.*

Personal Injuries — Master and Servant — Negligence — Evidence —
Insufficiency.

1. The burden which is on him who alleges negligence to prove it by substantial evidence is not sustained by testimony which furnishes the basis for two equally permissible conclusions as to what caused the injury, one of which speaks negligence on defendant's part, while the second points to some other efficient proximate cause.

Same.

2. *Held*, that a judgment for plaintiff, a roustabout in a flour-mill and connecting warehouse, who at times had also acted as foreman in the warehouse and who was injured by the fall of sacks of flour alleged to have been so negligently piled in tiers as to become out of plumb, was not sustained by his testimony, which left it in doubt whether the accident was the result of the unstable condition of the pile of sacks, or whether plaintiff carelessly pulled them down upon himself in his attempt to gain the top of the pile without the aid of a ladder.

Same—*Res Ipsa Loquitur*—Inapplicability of Doctrine.

3. In the absence of evidence showing with any degree of certainty how the accident referred to above occurred, the doctrine of *res ipsa loquitur* was not applicable.

[As to accident as evidence of negligence, see notes in 6 Am. St. Rep. 792; 20 Am. St. Rep. 490; 30 Am. St. Rep. 736.]

Appeals from District Court, Gallatin County; Ben B. Law, Judge.

ACTION by Henry O. Scheytt against the Gallatin Valley Milling Company, a corporation. From a judgment in favor of plaintiff and an order denying its motion for a new trial, defendant appeals. Reversed with direction to dismiss the action.

Mr. Geo. Y. Patten, for Appellant, submitted a brief and argued the cause orally.

An employee assumes the risk incident to dangerous conditions when they are constant and of long standing, and the

danger is so obvious as to suggest itself to a person in possession of his faculties and of ordinary intelligence. (*Killeen v. Barnes-King Dev. Co.*, 46 Mont. 212, 127 Pac. 89.) Where the plaintiff's case raises the presumption that he has been guilty of contributory negligence, he must assume the burden of showing that he is not guilty of such negligence. (*Nelson v. City of Helena*, 16 Mont. 21, 39 Pac. 905; *Lynes v. Northern Pacific R. Co.*, 43 Mont. 317, Ann. Cas. 1912C, 183, 117 Pac. 81; *Harrington v. Butte, A. & P. Ry. Co.*, 37 Mont. 169, 16 L. R. A. (n. s.) 395, 95 Pac. 8; *Longpre v. Big Blackfoot Milling Co.*, 38 Mont. 99, 99 Pac. 131.) Cases involving facts similar to the one at bar, in which the injured man was held to have assumed the risk, are: *Lewis v. Koller & Smith*, 186 Fed. 403, where a box fell and caused the injury; *Chicago, Rock Island & Peoria Ry. Co. v. Grubbs*, 97 Ark. 486, 134 S. W. 636, and *Sampson v. Southern Ry. Co.*, 154 N. C. 51, 69 S. E. 683, where the injuries were received from ties falling from piles; *Hodgson v. Michigan Cent. R. Co.*, 146 Mich. 627, 109 N. W. 1125, and *Foley v. Grand Rapids Gaslight Co.*, 127 Mich. 671, 87 N. W. 53, where the injuries resulted from cave-ins in trenches; *Paoline v. J. W. Bishop Co.*, 25 R. I. 298, 55 Atl. 752, a beam rolled and fell while it was being raised, and caused the injury to plaintiff. (See, also, *Little v. Hyde Park Elec. L. Co.*, 191 Mass. 386, 77 N. E. 716; *Steeple v. Panel & Folding Box Co.*, 33 Wash. 359, 74 Pac. 475; *Consolidated Gas Elec. L. & P. Co. v. Chambers*, 112 Md. 324, 26 L. R. A. (n. s.) 509, 75 Atl. 241; *Goddard v. Interstate Tel. Co.*, 56 Wash. 536, 106 Pac. 188.)

While it is a general rule of law that the master is charged with the duty of furnishing a safe place to work, the above cases recognize the exceptions to this rule. (*New Omaha Thompson-Houston Electric Light Co. v. Rombod*, 68 Neb. 54, 93 N. W. 966, 97 N. W. 1030; *Soderburg v. Wells*, 57 Wash. 281, 106 Pac. 751; *Williams v. Choctaw etc. Ry. Co.*, 149 Fed. 104, 79 C. C. A. 146; *Nortonville Coal Co. v. Brooks*, 30 Ky. Law Rep. 671, 99 S. W. 357; *Nashville C. & St. L. R. Co. v. Hayes*, 17 Tenn. 680, 99 S. W. 362; *Bruilett's Creek Coal Co. v. Pomatto*, 172 Ind.

288, 88 N. E. 606; *McNulty v. Power*, 203 Mass. 320, 89 N. E. 557; *Texas & P. Ry. Co. v. Lewis* (Tex. Civ.), 133 S. W. 1086; *Cole v. Spokane Gas & Fuel Co.*, 66 Wash. 393, 119 Pac. 831; *Leary v. Houghton County Traction Co.*, 171 Mich. 365, 45 L. R. A. (n. s.) 359, 137 N. W. 225; *Hartigan v. Deerfield Lbr. Co.*, 85 Vt. 133, 81 Atl. 259; *Seininski v. Wilmington Leather Co.*, 3 Boyce (26 Del.), 288, 83 Atl. 20.)

Where the danger incident to an employment is alike open and obvious to the master and servant, both are on an equality, and the master is not liable for an injury resulting from the danger. (*McFadden v. City of Philadelphia*, 248 Pa. 83, 93 Atl. 827; *Price v. Lee Lumber Co.*, 125 La. 888, 51 South. 1025; *Wabash R. Co. v. Ray*, 152 Ind. 392, 51 N. E. 920; *Welch v. Carlucci Stone Co.*, 215 Pa. 34, 7 Ann. Cas. 299, 64 Atl. 392; *Ramm v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ.), 92 S. W. 426; *Tham v. J. T. Steeb Shipping Co.*, 39 Wash. 271, 81 Pac. 711; *Fort Worth S. Y. Co. v. Whittenburg*, 34 Tex. Civ. App. 163, 78 S. W. 363.)

It is also an elementary rule of law, applicable here, that where the tool, appliance or method used by the servant is of a simple, common, ordinary character, the nature of which is easily understood, and with which the servant is familiar, he cannot charge his master with any injury which he receives, but assumes the risk or danger himself. (*Philip Carey Roofing & Mfg. Co. v. Black*, 129 Tenn. 30, 51 L. R. A. (n. s.) 340, 164 S. W. 1183; *Bougas v. Eschbach-Bruce Co.*, 77 Wash. 347, 137 Pac. 472.)

Mr. H. S. Farris and *Mr. C. E. Carlson*, for Respondent, submitted a brief; *Mr. Carlson* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for damages for personal injuries sustained by plaintiff during the course of his employment by defendant as roustabout in one of its warehouses at Belgrade, in Gallatin county.

The defendant owns and operates a flour-mill at Belgrade. In connection with it, it owns warehouses used for the purpose of storing flour and other mill products. Plaintiff had been in the service of the defendant for three years and about eight months. During one year of this time he had occupied the position of foreman in charge of the roustabout crew consisting of from two to six men, but about a year before the time of the accident he had been superseded by Frank Lynn and thereafter served as a roustabout. While engaged in this capacity his duties required him to perform any labor necessary about the mill and warehouses, including the moving of sacks of flour from the mill to the warehouses and piling them therein, and, when occasion demanded, taking the sacks from the piles and loading them in cars for shipment. The duties of the foreman were to supervise the roustabouts in the performance of their duties, including the handling and piling of flour in the warehouses and the inspection of the piles from time to time to see that in the process of settling they did not get out of plumb and become likely to fall, thus creating a source of danger to those who might be working in proximity to them or engaged in loading cars from them. The accident occurred on August 5, 1914. Lynn had been absent from July 20 in attending to other duties assigned him. He had returned about August 1. During his absence the plaintiff had superintended the other roustabouts in the building of a pile of 98-pound sacks in one of the warehouses which adjoined the mill. It consisted of four or five tiers, each made up of two rows of sacks laid end to end, the joints being broken as in laying brick in a wall. The ends of them were tied or locked by sacks laid crosswise. The end of the tiers constituted the end, and the sides of the outer tiers the side, of the pile. It was twelve or fourteen feet high and extended up near the slant of the roof of the warehouse. Plaintiff had personally assisted in building this pile. Mr. Parkins, the secretary and head bookkeeper of the defendant, had charge of the business office, including general charge of the warehouses. On August 5 he delivered to plaintiff an order to clean a car on

the warehouse track of the Milwaukee railroad and load it with flour, to be taken out about noon. Lynn, the foreman, was not then in the warehouse but was nearby. Without notifying him of the receipt of the order or awaiting instructions from him, plaintiff proceeded in company with Edgar Bertelson, another roustabout, to execute the order. While Bertelson was bringing up a truck to receive a load of sacks, plaintiff climbed up the side of the pile to pass them down. He had climbed up to the top of the pile near the roof, when the sacks began to roll and fall. He attempted to catch hold of the rafters to allow the sacks to go under him but was not able to do so. He then jumped and, being caught by the falling sacks, suffered a comminuted fracture of the femur of his left leg and a minor injury to the ankle.

The negligence alleged in the complaint is (1) that the [1, 2] defendant had permitted the tiers of sacks comprising the pile to be so negligently built that while the outside tier was apparently straight and safe, the tier immediately behind it was standing in an uneven, unsupported, crooked, leaning and otherwise defective condition, so that it caused the first tier to fall upon the plaintiff as he attempted to climb the pile; and (2) that defendant had failed to inspect the tiers of sacks in the pile and had omitted to warn the plaintiff of its dangerous condition. The answer, admitting the occurrence of the accident and consequent injuries of the plaintiff, denies that defendant was guilty of negligence. It also alleges the usual defenses of contributory negligence and assumption of risk. The trial resulted in a verdict and judgment for the plaintiff. The defendant has appealed from the judgment and an order denying its motion for a new trial.

Counsel challenges the integrity of the judgment on the ground that the evidence is insufficient to justify the verdict, and that the court therefore erred in denying defendant's motion for a new trial. Among others he makes the contention that there is no substantial evidence to establish the negligence alleged in respect to the condition of the pile of sacks. After

a careful study of the record we have concluded that this contention must be sustained.

The plaintiff was himself the only witness who testified in his behalf as to the circumstances of the accident; and as his testimony was not aided in any way by that of any of defendant's witnesses, we must look to it alone to find support for the charge of negligence. As presented in the transcript, his testimony is not clear. The following brief synopsis of it, added to the foregoing statement, with the excerpts quoted below, includes all to be found therein on the subject. He stated: That the pile had been standing for about two weeks; that when he went to it he climbed up the middle of the side; that he went up until, he judges, his waist line was about even with the top; that he then saw that it was moving; and that he saw the first tier moving toward him, and a part of the second. We quote: "Q. Was the second tier leaning against the forward tier? A. Yes, sir. * * * I then tried to run my hand into the rafters, but couldn't reach it, so as to let the flour go from under me. I then jumped and the flour fell over on to me. Q. Did any of the second tier fall, Mr. Scheytt? A. Some. Q. Do you know how much of the second tier fell? A. No, I do not." Again: "I don't know how much of the first tier of flour came with me when I fell, nor the second tier either. If they were leaning any, they are bound to come together. I hadn't touched the second row that made up the first tier as I got up on top. I stated that I had gotten up so that my waist line was about even with the top. In starting to climb the pile I did not run or jump; it wouldn't do any good to jump because you have got to go up the side. I didn't look around; I just walked up to the pile. It is not always easy to go on a pile of flour; but when climbing you have got to walk right up." Again: "Those tiers of flour should be as straight as possible; there is very little space, if any, between—probably a little at the bottom; there is very little space at the top—ought not to be any—they should fit tight. There is sufficient space so that you can look up between them and see if the tiers are leaning against each

other. When I came in and looked at this pile I gave a glance at it, and it appeared to me to be safe—I mean by that that it was perfectly safe to climb up. The forward tier appeared to be straight. * * * These piles of flour get out of plumb quite often, and the foreman's inspection discloses these defects. He would then order the men to repile or brace it. * * * There are piles of flour in all three of the warehouses, or two of them most of the time. Almost daily during that period of one year that I was foreman, I had occasion to inspect these piles, and I became quite skilled in noticing whether or not the flour was piled up properly or whether it was leaning, or whether it required repiling. As a matter of fact, I became quite skilled in that respect. I would go along the ends of the piles and look between the tiers and see whether or not the tiers were leaning. At that particular pile there was no flour in the center [of the warehouse] at all. There is a vacant space there that there is no flour in at all. In other words, there was a space of about ten feet in front of the end between the piles. * * * When I went into the warehouse in the morning of August 5, 1914, I did not inspect the pile to see whether it was safe; I just made a casual glance and then went up the center of the pile; it wasn't my duty to inspect it. I wasn't on the end of the pile; I went up along the side. I didn't go to the end of the pile at all."

The most that can be said of this testimony is, that it amounts to a mere conclusion by the plaintiff that the second tier was out of plumb because the outer tier fell bringing a part of it down. It negatives the idea that he ascertained this fact by observing the condition of the pile before he attempted to climb up on it; and the position in which he was standing at the time he discovered it in motion also negatives the idea that he could then observe whether the second tier was leaning. If there was no space between the tiers at the top, as he said should have been the case if the pile had been properly built—and he nowhere suggests that this was not the fact—it was manifestly impossible for him to see that the second or inner tier was out of plumb

and leaning against the outer one. Nor is there any suggestion in his testimony that tends to exclude the idea that in attempting to climb to the top by thrusting his hands and feet between the sacks, as he must have done—he did not use a ladder or other device to assist him—he pulled the sacks down upon himself. Thus, whereas it was incumbent upon him to furnish the jury substantial proof of the defective and dangerous condition resulting from defendant's negligence, he left them to speculate as to the cause of the injuries. That this is the probative value of the evidence is emphasized by the uncontradicted testimony of Mr. Fisher, the general manager of the defendant. When he heard of the accident he went immediately to the warehouse, where plaintiff was lying on the floor, and upon asking him how he had been hurt, received the answer, "that he thought he was careful, but probably he may have been a little careless, he thought probably it was his own fault." When the evidence is in this condition, it will not support a recovery. The burden is upon him who alleges negligence to prove it by substantial evidence (*Reino v. Mineral Land Dev. Co.*, 38 Mont. 291, 99 Pac. 853; *Byrnes v. Butte Brewing Co.*, 44 Mont. 328, Ann. Cas. 1913B, 440, 119 Pac. 788); and this burden is not sustained if the evidence furnishes the basis for two equally permissible conclusions as to what caused the injury, one of which speaks negligence on the part of the defendant, while the other is wholly inconsistent with it, and points to some other efficient proximate cause. This court has repeatedly so held. (*Shaw v. New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515; *Olsen v. Montana Ore Pur. Co.*, 35 Mont. 400, 89 Pac. 731; *Monson v. La France Copper Co.*, 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243; *Winnicott v. Orman*, 39 Mont. 339, 102 Pac. 570.)

While, as noted in the foregoing statement, one of the duties of the foreman was to inspect the piles from time to time, which would imply the duty also, in proper cases, to warn the employees who were required to work upon or near them of their dangerous condition, there is no evidence in the record that Lynn had neglected this duty. True, he testified that he had

not received any instructions on the subject; but he also testified that it was his custom to observe the different piles from time to time, that he had looked over this particular pile on August 3 before the accident, and that it was apparently in a safe condition, because none of the tiers were leaning. In speaking of the two rows of sacks making up the outside tier, he stated further that by reason of the way the flour was piled, it was impossible for the second tier to be in a leaning condition while the first or outside tier was straight. This testimony was not contradicted in any way. In face of these categorical statements, the jury could not have found from the fact alone that the pile fell that the defendant failed in its duty to inspect. But whether it did or not is wholly immaterial in view of the conclusion stated above. If the pile was not in a dangerous condition, no amount of inspection would have discovered any danger and so render a warning necessary.

Counsel for plaintiff contends that the doctrine of *res ipsa loquitur* applies, and hence a case was made for the jury, citing *Hardesty v. Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29. This doctrine, however, can have no application to cases of this character. (*Barry v. Badger*, 54 Mont. 224, 169 Pac. 34.) "That rule, as applied to falling objects, covers cases where the occurrence is of such an unusual and extraordinary character that it would not happen except for want of due care, or that the cause of the fall was something over which the defendant had absolute and complete control; and in the nature of things there could be no fall except in the negligent doing of some act peculiarly within the knowledge and control of the defendant." (*Samardege v. Hurley-Mason Co.*, 72 Wash. 459, 130 Pac. 755.) As stated above, there is no evidence showing with any degree of certainty how the accident occurred and whether it was the result of the unstable condition of the pile or whether the plaintiff carelessly pulled the sacks down upon himself in his attempt to gain the top of the pile as he did.

Since the evidence is wholly insufficient to sustain the verdict and it is apparent that the plaintiff produced at the trial all in

his possession or available, it would serve no purpose to order another trial. For the same reason a determination of the several other contentions made by counsel is wholly unnecessary. The judgment and order are reversed and the district court is directed to dismiss the action.

Reversed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. HOLCOMB, RELATOR, v. DISTRICT COURT
ET AL., RESPONDENTS.

(No. 4,198.)

(Submitted March 18, 1918. Decided April 16, 1918.)

[172 Pac. 329.]

*Supervisory Control—Perpetuation of Testimony—Petition—
Sufficiency — Witnesses — Adverse Party — Stipulations —
Waiver.*

Evidence—Perpetuation of Testimony—Petition—Sufficiency.

1. A petition for the perpetuation of testimony which recited that the applicant expected to be a party to an action in a district court of this state, naming the intended adverse parties and stating the nature of the controversy, the residence of the witnesses and that accounts and records in their keeping and which they were desired to bring with them, were necessary to illustrate and make understandable their testimony, was sufficient under section 8043, Revised Codes, to entitle petitioner to the order prayed for.

Same—Adverse Parties—Witnesses.

2. Since an adverse party may be a witness, his testimony may be taken as provided by sections 8042 and 8043, Revised Codes.

Same—Stipulations—Waiver.

3. By entering into a stipulation for a change in the time and place of taking their testimony for the purpose of perpetuation, the parties defendant to an action in which such testimony was intended to be used waived the objection that, being adverse parties, their testimony could not be taken.

Original application by the State, on the relation of Rollin P. Holcomb, for writ of supervisory control to the District Court of the Seventeenth Judicial District in and for Phillips County,

and John Hurly, Judge thereof, to annul an order vacating an order directing testimony to be taken for the purpose of perpetuation. Order annulled.

Messrs. Norris & Hurd, for Relator, submitted a brief; *Mr. George E. Hurd* argued the cause orally.

Messrs. Slattery & Kline, for Respondents, submitted a brief; *Mr. John M. Kline* and *Mr. Torger Sinness*, the latter of the Bar of North Dakota, of Counsel, argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

The relator, Rollin P. Holcomb, presented to the Hon. John Hurly, as judge of the district court of Phillips county, a verified petition praying an order to take the testimony of R. D. Sutherland, E. R. Kahla and P. E. Skjerseth before John Hurly, judge of said court, at Saco, Montana, the said Sutherland, as cashier of the First National Bank of Saco, to bring with him certain accounts and records of said bank for use in connection [1] with such testimony. The petition recited that Holcomb "expects to be a party to an action" in said or some other district court of the state, having as adversaries the bank and the individuals above named; that the controversy relates to the amount of indebtedness due the bank from Holcomb, and upon the trial thereof it will be necessary for him to prove certain facts which are set forth, relative to the execution and purpose of certain promissory notes and relative to payments made by Holcomb upon or in connection with the same and not credited or miscredited to Skjerseth; that the said witnesses reside at Saco and all of them are or have been officers of said bank; that the accounts and records desired are necessary to illustrate and make understandable the testimony sought to be taken. The petition was granted and the order made accordingly, designating February 2, 1918, at 1 P. M. at the courthouse in Malta as the time and place for such examination, and directing subpoenas to issue; subpoenas were issued, but the time and place

so fixed were later changed by stipulation to Saco on February 11, 1918.

Thereafter the bank and the individuals so named moved the judge to vacate and set aside the order directing that such testimony be taken, upon the ground "that neither said court nor judge had, nor has either of them, jurisdiction to make or enforce said order," for that no sufficient showing is made in the petition therefor, and the persons named are not subject to have their testimony taken in advance because they are adverse parties. This motion was granted, the order referred to was vacated and in consequence the testimony sought was not taken, and cannot be taken, until the order to vacate is itself annulled—and it is this which the relator seeks by the present proceeding.

Assuming that the motion to vacate was properly addressed and presented to the authority from whence the order sought to be vacated had come, the fundamental question presented is whether a sufficient showing was made by the relator's petition to authorize the order of examination. Of this we have not the slightest doubt. The proceeding was under the authority of sections 8042 and 8043, Revised Codes, which provide:

"Sec. 8042. The testimony of a witness may be taken and perpetuated as provided in this chapter.

"Sec. 8043. The applicant must produce to a judge of the district court a petition, verified by the oath of the applicant, stating that the applicant expects to be a party to an action in a court in this state, and, in such case, the names of the persons whom he expects will be adverse parties; * * * and the name of the witness to be examined, his place of residence, and a general outline of the facts expected to be proved. The judge to whom such petition is presented must make an order allowing the examination, etc. * * *

These requirements are simple, direct and plain. With them the relator's petition fully complied, and thus he became entitled to the order (13 Cyc. 875, 876; *Martin v. Hicks*, 6 Hun (N. Y.), 238; *In re Livingston*, 12 Mo. App. 80; *Newton v. State*, 21 Fla. 53; *Morse v. Grimke*, 8 N. Y. Supp. 1). Much discussion and

citation of authority are offered to show that something more than the statute requires was necessary, but what other courts may have said touching other statutes or in the effort to construe provisions similarly clear is not convincing. (Rev. Codes, sec. 4.)

Contention is made, however, that under these provisions a [2, 3] party may not be subject to examination. The answer is that an adverse party may be a witness and as such may be examined. In any event, the respondents—viewing them as parties—agreed in effect that their testimony should be taken when they stipulated for a change in the time and place of taking.

The order to take the testimony having been made on a sufficient showing, it required something more than an attack upon that showing to justify a vacation of the order.

It follows that the order vacating the order to take testimony must be annulled. It is so adjudged and directed, the respondents to proceed accordingly.

Order annulled.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. VAN ET AL., RELATORS, v. DISTRICT COURT
ET AL., RESPONDENTS.

(No. 4,196.)

(Submitted March 15, 1918. Decided April 19, 1918.)

[172 Pac. 540.]

Certiorari—Forfeitures—Bail Bonds—Sureties—Jurisdiction.

Bail Bonds—Forfeiture—Void Judgment.

1. *Held*, on *certiorari*, that while the district court may, under section 9468, Revised Codes, summarily enter judgment against the person charged with crime who fails to appear according to the condition of his bond, it exceeds its jurisdiction when it goes further than to authorize proceedings by the county attorney against

the sureties by proper action, and at once enters judgment against them for the amount of the bond.

Certiorari—Writ Lies, When.

2. Inasmuch as an appeal does not lie from a judgment summarily entered against the sureties on a bail bond, and there is not any other plain, speedy and adequate remedy, *certiorari* lies to annul it.

[As to questions reviewable on a writ of *certiorari*, see note in 40 Am. St. Rep. 29.]

Original application for writ of *certiorari* by the State on the relation of Oliver and Anna Van, running to the District Court of the Fourteenth Judicial District, in and for the County of Wheatland and John A. Matthews, Judge thereof, to annul a judgment declaring a bond, executed by relators, as forfeited. Judgment annulled.

Mr. Thos. M. Murn, for Relators, submitted a brief and argued the cause orally.

Mr. L. D. Glenn, for Respondents, argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Certiorari. On July 11, 1917, one Roderick K. McLeod was charged by information by the county attorney of Wheatland county, with the crime of arson in the first degree. He was then confined in the county jail. Later he was released on bail in the sum of \$2,000, the relators herein becoming his sureties. After one or more postponements, his trial was fixed for January 16, 1918, but he failed to appear according to the condition of his bond. Thereupon the court declared his bond forfeited and summarily rendered and caused to be entered judgment against the relators for the amount thereof. This proceeding was thereupon instituted by them to have the judgment annulled on the ground that the court was without jurisdiction to render it.

The procedure for the forfeiture of bail bonds, the fixing of [1] the liability of the sureties, and the enforcement of the collection of the amount of the penalty are found in Chapter I of Article VII, Title XII of Part II of the Revised Codes. Since the Codes contain no other provisions on the subject, those

found in this Chapter must be looked to by the courts as defining the extent of their power and as the exclusive guide as to the mode of exercising it. The provisions pertinent here are found in sections 9468 and 9471, which are as follows:

“Sec. 9468. When any person under bond or undertaking in any criminal action or proceeding, either to appear and answer, or to prosecute an appeal, or to testify in any court, fails to perform the condition of such bond or undertaking, his default must be entered in the minutes, and judgment entered against him for the amount of such bond or undertaking, and proceedings may be taken to recover judgment against any or all of the sureties thereto in any court having jurisdiction.

“Sec. 9471. If the forfeiture is not discharged, as provided in this Article, the county attorney may at any time proceed by action only against the bail upon their undertaking.”

The former section in express terms authorizes the summary entry of judgment against the person under bail when he has incurred forfeiture, but with regard to the sureties goes no further than to authorize proceedings in any court having jurisdiction. The latter authorizes the county attorney to proceed against the sureties by action *only*, if the forfeiture has not in the meantime been discharged as provided elsewhere in the Chapter. (Sec. 9469.) In view of these explicit provisions, the court was wholly without power to render the judgment summarily.

No question is presented as to whether the relators have [2] invoked the proper remedy. It is clear, however, that an appeal does not lie, because, though the judgment is final, it is not “a judgment entered in an action or special proceeding commenced in a district court, or brought in a district court from another court.” (Rev. Codes, sec. 7098.) Neither is there any other plain, speedy and adequate remedy. (Rev. Codes, sec. 7203.) *Certiorari* is therefore the proper remedy.

The judgment is annulled.

Judgment annulled.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. BRASHEAR, RELATRIX, v. DISTRICT COURT
ET AL., RESPONDENTS.

(No. 4,200.)

(Submitted March 19, 1918. Decided April 19, 1918.)

[172 Pac. 539.]

Contempt—Evidence—Insufficiency—Supervisory Control.

1. Relatrix was *ex parte*, upon the allegation of the complaint filed under the provisions of Chapter 95, Laws of 1917, enjoined *pendente lite* from suffering or permitting the use of a saloon and dance-hall by females. Though the question whether she was the owner or manager of the place was thus left undecided at the time she was tried for a violation of the order, she was found guilty of contempt. *Held*, on application for writ of supervisory control, that in the absence of evidence showing relatrix to have been in control of the place, she could not possibly have violated the order in permitting something to be done on the premises, and therefore order annulled.

Original application for writ of supervisory control by the State on the relation of Pansy Brashear against the District Court of Silver Bow County and J. J. Lynch, a Judge thereof, to annul an order adjudging relatrix guilty of contempt. Order annulled.

Messrs. Canning & Geagan, for Relatrix, submitted a brief; *Mr. F. E. Geagan*, argued the cause orally.

Mr. N. A. Roterling, for Respondents, submitted a brief and argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Under and by virtue of Chapter 95, Session Laws of 1917, the [1] district court of Silver Bow county issued an injunction *pendente lite*, restraining Pansy Brashear, as owner, agent or manager, Thomas L. Carson, as record owner, and J. A. O'Neil, as reputed owner, from suffering or permitting the use of a certain saloon and dance-hall near Butte, known as "O'Neil's Place," as a place where female persons are permitted to be and remain for the purpose of being there supplied with intoxi-

cating liquor. This order was made without notice upon a verified complaint filed on behalf of the state of Montana by the county attorney of Silver Bow county, and together with the summons and a copy of the complaint was served upon Brashear. Thereafter an affidavit was filed, averring that Brashear, notwithstanding said order which was then in full force and effect, did on January 27, 1918, suffer and permit female persons to be and remain in said place for the purpose of being supplied with liquor and who were so supplied, and asking that she be cited to show cause why she should not be punished for contempt. A citation issued, Brashear appeared and entered a plea of not guilty. A hearing was had, witnesses were sworn and examined, and it resulted in a final order, made on March 4, 1918, adjudging that Brashear had been guilty of contempt as charged, and that she should pay a fine of \$200, or in default of such payment, be confined in the county jail of Silver Bow county one day for each two dollars of such fine.

This order Brashear seeks to have annulled, upon the ground that no substantial evidence was presented to support it. We think her contention is sustained by the record, and in effect admitted by the briefs of respondents. The injunction order issued, *ex parte*, upon the allegation of the complaint, still subject to joinder of issue, that she was an owner or manager of the place, was not and could not be an adjudication of that fact for the purpose of this proceeding. She was enjoined from "suffering or permitting" the use of the place for the prohibited purpose, and by no stretch of the imagination could she be guilty of violating the order, that is, of "suffering or permitting" such use, unless, as a person in authority over the place, she had the power to "suffer or permit." That this was the case does not appear; she neither solicited, sold, served or received pay for any drinks; she directed nothing, suffered nothing, permitted nothing, so far as the conduct of the place was concerned; she was there apparently as others were there, and drank as others drank. One witness, asked: "Who runs the place, if you know?" answered: "Why, so far as I know, Miss

Brashear runs it." How far he knew we are not advised, further than that he says: "I saw her buy a drink and she didn't offer to give any money in payment for it." This is absolutely all, and to call it "clear proof" sufficient to justify adjudication in contempt would require a different standard of judgment than any that has yet found favor with courts.

The order complained of is annulled.

Order annulled.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

GREAT FALLS TOWNSITE CO., APPELLANT, v. KOWELL,
RESPONDENT.

(Nos. 3,894 and 3,934—Consolidated Appeals.)

(Submitted March 14, 1918. Decided April 20, 1918.)

[172 Pac. 321.]

Ejectment — Appeal and Error — Brief — Judgment — Immaterial Modification.

Appeal and Error—Briefs—New Trial Order—Affirmance, When.

1. An order denying a new trial will be affirmed where there is neither brief nor argument challenging the justice or accuracy of the verdict, nor any reason suggested why the motion should have been granted.

Ejectment — Judgment — Immaterial Modification — Right of Appellant to Complain.

2. Where plaintiff corporation in an action in ejectment was decreed to be without right or title and, by failure to assail it, in effect confessed that it was not injured by the scope of the judgment, it was not in position on appeal to ask for a modification of it.

*Consolidated appeals from District Court, Cascade County;
J. B. Leslie, Judge.*

ACTIONS by the Great Falls Townsite Company against John and Annie Kowell. Plaintiff appeals from a judgment in favor of defendants, and from an order denying it a new trial. Affirmed.

Cause submitted on briefs of counsel.

Messrs. Cooper, Stephenson & Hoover, for Appellant.

Messrs. Greene & Cockrill, for Respondent.

MR. JUSTICE SANNER delivered the opinion of the court.

These are separate appeals—one from the judgment and another from an order denying plaintiff a new trial—consolidated and submitted at the request of counsel for plaintiff, appellant here.

The action was in ejectment, the plaintiff claiming title to a certain tract of land in Cascade county in the possession of the defendants John and Annie Kowell. John Kowell answered, denying the plaintiff's title, pleading the statute of limitations, and affirmatively alleging facts and circumstances amounting to adverse possession for over twenty-two years, but without casting the affirmative allegations in the form of a counterclaim or cross-bill. Trial was to a jury, whose verdict was a general one "for the defendant." Upon this verdict, judgment was entered that defendant John Kowell have his costs, and further, that "the said defendant John Kowell have and retain possession of the lands in the answer of defendant described, he having established title thereto and the whole thereof by adverse possession according to law."

Upon neither appeal is there any brief or argument challenging the justice or accuracy of the verdict, nor is it anywhere suggested that there is any reason why the plaintiff's motion for a new trial should have been granted. The order denying a new trial must therefore be affirmed.

On the appeal from the judgment, the only contention is that [2] the judgment is too broad, in that it affirmatively adjudicates title in the defendant without sufficient basis in the pleadings for such adjudications and the only relief sought is a modification accordingly. In so far as the judgment determines the plaintiff to be without right or title, it is not assailed; yet by

that judgment the plaintiff is put out of the case, and, being out, it cannot complain of provisions in the judgment which are academic so far as its interests are concerned. As it is not injured by the scope of the judgment, it cannot be benefited by a modification thereof.

The judgment is therefore also affirmed.

Affirmed

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

**STRONG, RESPONDENT, v. BUTTE CENTRAL & BOSTON
COPPER CORPORATION ET AL., APPELLANTS.**

(No. 3,853.)

(Submitted January 25, 1918. Decided April 22, 1918.)

[172 Pac. 1033]

*Pleading and Practice—Issues—Judgment on Pleadings—
Waiver—Entry of Default—Admissions—Estoppel.*

Pleading and Practice—Complaint—Money Demands—Judgment—Waiver.

1. Where the only relief demanded by plaintiff is a judgment subjecting attached property to the satisfaction of his claims against defendants, and not a personal judgment against any of them, he waives all rights for further relief if the proceeds of the sale of the property fail to equal in amount the aggregate of his claims.

Same—Issues—Judgment on Pleadings—Proper Entry.

2. A mining company whose property had been sold by a trustee in bankruptcy and the sale confirmed, subject to an attachment lien in favor of plaintiff, was not in position to complain of an order sustaining his motion for judgment on the pleadings where the judgment ran only against its property and not against anyone personally.

Same.

3. Where defendant, whose demurrer to an amended complaint and motion to strike a supplemental one had been overruled, was given time within which to answer and did answer the supplemental complaint but failed to plead further to the amended one, which latter stated plaintiff's causes of action, an order for judgment on the pleadings was proper.

Same—Entry of Default—Judgment on Pleadings.

4. The fact that default for failure to answer was never formally entered does not prevent the rendition of a valid judgment on the pleadings.

Same—Admissions—Failure to Deny—Estoppel.

5. Defendant, as successor in interest of a purchaser of property at a bankruptcy sale subject to the satisfaction of an attachment lien, by failure to make denial admitted the amount claimed by the lienor, and was therefore estopped to question an order of sale to satisfy the lien.

Appeal from District Court, Silver Bow County, in the Second Judicial District; Albert P. Stark, Judge of the Sixth District, Presiding.

ACTION by L. Wilton Strong against the Butte Central & Boston Copper Corporation, Austin M. Pinkham et al. Judgment for plaintiff and the above-named defendants appeal. Affirmed.

Messrs. Pinkham, Chittenden & West, Messrs. Kremer, Sanders & Kremer, Mr. William Wallace, Jr., Mr. John G. Brown, and Mr. J. B. Weir, for Appellants, submitted an original and a supplemental brief; Mr. J. Bruce Kremer and Mr. Austin M. Pinkham, of Counsel, argued the cause orally.

Messrs. Gunn, Rasch & Hall, for Respondent, submitted a brief; Mr. M. S. Gunn argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to recover on money demands aggregating \$24,485.44, with interest. The Butte Central & Boston Copper Corporation (hereinafter called the Butte Central), the Freeman I. Davison Company, Limited, the Tri-National Corporation, Limited, Samuel A. Hall, Freeman I. Davison and Robert G. McMeekin, were made defendants. Certain property (hereinafter referred to as the Ophir claim) belonging to the Butte Central was attached at the instance of the plaintiff. There was answer by the Butte Central and reply by plaintiff. Thereafter the Butte Central was adjudged a bankrupt and the trustee in bankruptcy was substituted as defendant in its place. The trustee's answer was substantially the same as that of the Butte Central, and to this answer reply was made. On December 10, 1910, upon a showing that the trustee had completed the execu-

tion of his trust, he was dismissed from the action and the Butte Central again made a party defendant. Thereupon the plaintiff filed an amended complaint, in all essential respects the same as the original, and to this the Butte Central interposed a demurrer.

On October 11, 1913, plaintiff filed a supplemental complaint in which the bankruptcy proceedings are set forth at length. The only matters of consequence here are, that acting under an order of court, the trustee sold the property belonging to the bankrupt estate, including the Ophir claim, and that the sale was confirmed. Walter S. Tallant purchased the Ophir claim subject to certain liens and encumbrances not affected by the bankruptcy proceedings, including the attachment in this case, and thereafter Austin M. Pinkham succeeded to Tallant's interest, was made a party defendant in this action, and filed a general demurrer to the amended complaint and a motion to strike the supplemental complaint from the files. The demurrer and motion were overruled, and Pinkham and the Butte Central then filed an answer and afterwards an amended answer to the supplemental complaint in which they admit every fact pleaded, except the allegation that the Ophir claim was conveyed to the purchaser subject to the attachment lien in this action. With respect to that allegation it is alleged that the property so sold was conveyed "in accordance with the contract made for such purpose." It is further alleged in the amended answer that plaintiff's right to enforce the attachment lien is barred by the provisions of sections 5728 and 6446, Revised Codes; that the facts pleaded in the supplemental complaint constitute a departure from the cause of action stated in the amended complaint, and that to grant the prayer of the supplemental complaint would amount to a denial of due process of law.

There was a reply which amounts to a general denial, and upon the record as thus made up, plaintiff moved for a judgment authorizing the sale of the attached property to satisfy his claims. By an order general in terms, the court sustained the motion, and judgment was entered accordingly. The concluding paragraph of the judgment recites: "It is further ordered,

adjudged and decreed, that the plaintiff do not have or recover any other or further judgment in this action and that said cause be dismissed as to all of the defendants, except the said Butte Central & Boston Copper Corporation, and Austin M. Pinkham." From that judgment the Butte Central and Pinkham appealed.

It is to be borne in mind that plaintiff does not seek a personal [1] judgment against anyone, but only a judgment subjecting the attached property to the satisfaction of his claims. If the proceeds from the sale of this property fail to equal in amount the aggregate of his claims, he loses the balance, for he has waived all right to any further relief.

When the motion for judgment on the pleadings was submitted, the trial court had before it but a single inquiry: Are there any material issues for trial? And in reviewing the judgment, we must determine the same question.

(a) Do the pleadings present a material issue as between [2] plaintiff and the Butte Central? The judgment runs only against the Ophir claim, and all the right, title and interest of the Butte Central in that property had been sold by the trustee in bankruptcy. The judgment, therefore, cannot affect any interest of that defendant, and it cannot complain.

(b) Is there any issue raised as between plaintiff and defendant Pinkham?

Plaintiff's several causes of action are stated in his amended [3] complaint. The supplemental complaint alleges only facts material to the causes of action stated, and which occurred after the commencement of the action, viz., the proceedings in bankruptcy by which the Butte Central was divested of all interest in the attached property and Pinkham succeeded to an interest in that property subject to plaintiff's attachment lien. When Pinkham's demurrer to the amended complaint and his motion to strike the supplemental complaint were overruled, he was given twenty days within which to answer, and he answered the supplemental complaint but failed to plead further to the amended complaint. The trial court had the right to indulge

the presumption that he had raised or attempted to raise every question which he desired to have passed upon. His failure to deny any of the allegations which state plaintiff's cause of action must be taken as a confession on his part that the claims asserted by plaintiff are just and cannot be successfully contro-
[4] verted. The fact that Pinkham's default for failure to answer the amended complaint was never formally entered, is of no consequence. (*Herman v. Santee*, 103 Cal. 519, 42 Am. St. Rep. 145, 37 Pac. 509.) Strictly speaking, he was not in default, for he had responded to the trial court's order and had presented such an answer as he saw fit to make.

The allegations of the supplemental complaint which disclose
[5] the proceedings in bankruptcy are admitted specifically, and from those proceedings it appears that the Ophir claim was offered for sale subject to plaintiff's attachment lien; that Talant bid for the property subject to that lien; that his bid was accepted and the sale to him confirmed by the court; so that the answer amounts to nothing more than an admission that Pinkham's interest in the property is subject to the satisfaction of that lien, whatever the amount of it may be, and since he admits the amount as claimed in the amended complaint, he cannot be injured by a sale of the property to satisfy the judgment for that amount.

There is not any merit in any of the so-called affirmative defenses. There was not any issue for trial, and the order for judgment on the pleadings followed as of course.

If the motion had been heard and determined upon the theory that the allegations of the amended complaint were in issue, the judgment could not be justified and respondent could not urge a different theory in this court (*Dempster v. Oregon Short Line R. Co.*, 37 Mont. 335, 96 Pac. 717), but there is not a suggestion in the record that any such theory was urged upon or adopted by the court.

The motion for judgment searched the entire record as made and the order sustaining it has but one meaning, namely, that in the judgment of the trial court there was not presented for

trial any material issue. From the correctness of that conclusion there is no escape.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

Rehearing denied May 16, 1918.

ROBERTS ET AL., RESPONDENTS, v. OECHSLI ET AL.,
APPELLANTS.

(No. 3,897.)

(Submitted March 15, 1918. Decided April 22, 1918.)

[172 Pac. 1037.]

*Mining Claims—Adverse Suits—Evidence—New Trial—Newly
Discovered Evidence—Curing Error—Findings—When Con-
clusive.*

Evidence—Erroneous Exclusion—Curing Error.

1. Error in sustaining an objection to testimony was cured by later permitting the witness to answer the same question.

Same—Exclusion, When Proper.

2. Evidence which, if admissible, was a part of defendants' case in chief was properly excluded after they had rested and plaintiffs had introduced their evidence in rebuttal.

Mining Claims—Adverse Suits—Representation Work—Immaterial Evidence.

3. In an action to determine an adverse claim to mining property on application for patent, proof that defendants had done \$500 worth of representation work upon the claim was properly excluded, such inquiry, though material before the land office, being immaterial in an adverse suit.

Same—Findings—When Conclusive.

4. The finding of the district court in an adverse suit based upon evidence which is in irreconcilable conflict will not be interfered with on appeal.

New Trial—Newly Discovered Evidence—Proper Refusal.

5. Where alleged newly discovered evidence is merely cumulative, a new trial on that ground was properly refused.

[As to what is cumulative evidence within the rule excluding it when offered as newly discovered evidence in support of motion for new trial, see note in *Ann. Cas.* 1913D, 157.]

Same—Proper Refusal of Motion.

6. Newly discovered evidence as a ground for a motion for new trial must be evidence discovered after the trial which is material and which

the moving party could not with reasonable diligence have discovered and produced at the trial, it being incumbent on such party to disclose by his own affidavit that the new evidence was not known to him at the time of the trial.

Appeals from District Court, Silver Bow County; J. J. Lynch, Judge.

ACTION by E. A. Roberts and D. M. Morgan against George Oechsli, P. A. Comer and E. F. Mayer. Judgment for plaintiffs and defendants appeal from it and from an order denying their motion for a new trial. Affirmed.

Mr. William Meyer, for Appellants, submitted a brief and argued the cause orally.

Mr. J. E. Healy, for Respondents, submitted a brief, and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Defendants made application for patent for the Hugo quartz lode mining claim, and plaintiffs adversed and brought this action to have determined the relative rights of the parties to portions of the ground claimed by each. From a judgment in favor of plaintiffs and from an order denying a new trial defendants appealed.

1. Complaint is made that the court unduly restricted the cross-examination of one of the plaintiffs, but the record discloses that the widest latitude was allowed in the cross-examination of all the witnesses.

2. Plaintiff Morgan was asked to state his reason for joining [1] Roberts as a co-owner in the Fawn claim, and though an objection to the question was sustained, the question was thereafter repeated and the witness answered that his only reason for doing so was that Roberts had theretofore shown him a like favor with reference to a claim in the Cable district. The error, if any, was cured. (*Titus v. Anaconda Copper Min. Co.*, 47 Mont. 583, 133 Pac. 677.)

3. After defendants had rested and plaintiffs had introduced [2] their evidence in rebuttal, defendants called a witness and sought to show that the Hugo location covered the same ground as the May claim which had been abandoned. If the evidence was admissible for any purpose, it was a part of defendants' case in chief, and for this reason the ruling excluding it was not erroneous. There must be an end to the trial of a lawsuit some time, and a party cannot be permitted to introduce new subjects of inquiry at any stage of the proceedings.

4. Defendants complain that they were not permitted to prove [3] that they did certain annual representation work upon the Hugo claim and also the required amount of work to entitle them to patent. There was no question of forfeiture or abandonment involved, and whether they did work of the value of \$500 might have been a proper inquiry before the land office, but could not become material in the trial of an action of this character. (*Wilson v. Freeman*, 29 Mont. 470, 68 L. R. A. 833, 75 Pac. 84.)

5. The principal contention is that the findings are not supported by the evidence. Plaintiffs assert ownership, as against [4] everyone but the United States, of the Fawn claim located by them on January 1, 1912. Defendants assert like ownership to the Hugo claim located in 1906. On the conflicting portions of the two claims is the discovery shaft of the Fawn and the discovery cut of the Hugo. It is the contention of plaintiffs that between January 1 and 15, 1912, they sunk their discovery shaft five feet by five feet and ten feet deep in virgin ground within the limits of their claim, and that there were not then any indications of work done at the same place by anyone else. Defendants contend that in 1906 they excavated an open cut four feet by four feet and ten feet long within the limits of the Hugo claim as their discovery cut, which cut was at the same place as the discovery shaft afterwards sunk by the plaintiffs. A number of witnesses testified in support of each of these contentions. The evidence is irreconcilable. The question before the trial court was one of veracity, and having the superior advantage of seeing the witnesses and observing their demeanor, we cannot

say from the printed record that a different conclusion was commanded.

Plaintiffs further offered evidence to the effect that the Hugo claim as located did not conflict with the Fawn, but that after the Fawn location was completed, defendants moved the corner posts of the Hugo claim so as to include the Fawn discovery shaft within the limits of the Hugo. The presiding judge viewed the premises and found generally for plaintiffs and that defendants' claim to the ground in dispute is without right. The evidence was reviewed on motion for new trial and the motion was denied. Defendants have the burden of showing that the evidence preponderates against the findings (*Gibson v. Morris State Bank*, 49 Mont. 60, 140 Pac. 76), and in this respect they have failed.

6. In support of their motion for a new trial defendants tendered the affidavit of John W. Wade, to the effect that he had visited the ground in dispute, between 1906 and 1912, and had observed the open cut within the boundaries of the Hugo claim and at the point where plaintiffs' discovery shaft is sunk. Defendants cannot complain of the order denying them a new trial upon the ground of newly discovered evidence, for two reasons:

(1) The testimony of Wade was merely cumulative. (*Garfield M. & M. Co. v. Hammer*, 6 Mont. 53, 8 Pac. 153; *State v. Jones*, 32 Mont. 442, 80 Pac. 1095.)

(2) Wade's affidavit discloses that when he went upon the [6] ground in 1907, it was defendant Comer who pointed out to him the Hugo claim and the discovery cut, so that one of these defendants knew that Wade was in possession of the facts seven years before this case was tried, and these considerations alone fully justified the court's order; but furthermore, the affidavit of defendants Oechsli and Mayer recites that at the request of defendants, Wade came to Butte on July 14, 1914, and went over the ground to refresh his recollection and verify the impressions gained by his prior visits. The record discloses that the trial of this case commenced on July 15, 1914; so that, if the statement is accurate, the other defendants knew of Wade's informa-

tion the day before the trial. There are conflicting statements in this affidavit, and it may be that the date "July 14, 1914," is erroneous, but even so, there is not anything in the record which even tends to excuse the negligence of defendant Comer in failing to have Wade present at the trial. Newly discovered evidence as a ground for a motion for new trial must be evidence discovered after the trial, which is material and which the moving party "could not with reasonable diligence have discovered and produced at the trial" (sec. 6794, Rev. Codes); and the moving party must disclose by his own affidavit that the new evidence was not known to him at the time of the trial. (*Smith v. Shook*, 30 Mont. 30, 75 Pac. 513.)

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

WHITE ET AL., APPELLANTS, v. HAGBERY, ADMR.,
RESPONDENT.

(No. 3,852.)

(Submitted January 8, 1918. Decided April 22, 1918.)

[172 Pac. 1034.]

Pleading—Complaint—Inconsistent Allegations—Effect.

1. Where allegations of the complaint are directly contrary to each other, so that proof of one would disprove the other, they are self-destructive, the court must disregard both and construe the pleading as though neither were contained therein.

[As to inconsistent defenses within rules of pleading, see note in *Ann. Cas.* 1917C, 704.]

Appeal from District Court, Missoula County; Theo. Lentz, Judge.

ACTION by Earl D, and Mae White against Daniel Hagbery, administrator of the estate of John F. Hagbery, deceased. From a judgment of dismissal, plaintiffs appeal. Affirmed.

Cause submitted on briefs of Counsel.

Mr. Edward Mulroney and Mr. Gilbert J. Heyfron, for Appellant.

Mr. William Wayne, for Respondent.

HONORABLE ALBERT P. STARK, Judge of the Sixth Judicial District, sitting in place of the Chief Justice, delivered the opinion of the court.

According to the allegations of the amended complaint filed in this action, it appears that John F. Hagbery died in Missoula county on November 6, 1914, and that the defendant is the administrator of his estate. That between the year 1908 and the summer of the year 1912, the plaintiffs performed certain services for the deceased, who owned and operated a ranch in Missoula county, but (par. IV) "no payment of any kind or character, either in money or property was paid by the said John F. Hagbery, deceased, to the plaintiffs herein for the said services of both of the plaintiffs." That in the summer of 1912 the deceased desired to sell his said ranch and, "recognizing his indebtedness to the plaintiffs for such services so rendered, he thereupon told them * * * that if he succeeded in making a sale of said ranch for the sum of \$5,000, he would pay to the plaintiffs the sum of \$2,000 for their said services," but that the deceased was unsuccessful in his efforts to dispose of his ranch to others and on December 16, 1913, sold the same to the plaintiffs for the sum of \$5,000; that plaintiffs as payment of the purchase price gave to the deceased their promissory note for \$5,000, due in ten years, with interest at the rate of six per cent per annum, payable annually, which note was secured by a mortgage upon the purchased property.

It is next alleged (par. VII) that immediately after the execution and delivery of the note and mortgage to the deceased by the plaintiffs, and on the 16th day of December, 1913, the plaintiffs paid to the deceased as a payment upon, and part payment of, said note, the sum of \$2,000 as represented by the indebted-

ness of the deceased to the plaintiffs for the services rendered to him by the plaintiffs. That deceased then and there accepted said payment of \$2,000 as a payment upon, and a part payment of, said note and mortgage, but that during his lifetime he failed and neglected to credit the plaintiffs upon said note and mortgage with the said sum of \$2,000, and that the defendant as administrator has also failed and neglected, and at all times since his appointment has refused to make said endorsement. It is further alleged that the plaintiffs have tendered to the defendant, as administrator, the sum of \$180 as full payment of the interest due on said note and mortgage for the first year, which offer and tender the defendant refused, and that he threatens to foreclose said mortgage unless the plaintiffs pay to him the full sum of \$300 as interest on said note for said first year.

The prayer is that the defendant be required to indorse a credit of \$2,000 on said note and mortgage, and that he be compelled to accept \$180 as full payment of the first year's interest on said note, and that he be enjoined from foreclosing said mortgage.

To this amended complaint the defendant demurred on the ground that it does not state facts sufficient to constitute a cause of action. This demurrer was sustained and the plaintiffs granted twenty days in which to file a second amended complaint, and they having failed to do so, thereafter the default of the plaintiffs for such failure was duly entered and a judgment of dismissal was entered against them, from which order and judgment they now prosecute this appeal.

The sole point presented on this appeal is whether the court erred in sustaining the demurrer to the plaintiffs' amended complaint.

In paragraph IV of the amended complaint there is the direct allegation that no payment of any kind or character, either in money or property, was paid by the said John F. Hagbery, deceased, to the plaintiffs for the said services of both of the plaintiffs. In paragraph VII of the amended complaint, however,

the allegations of paragraph IV, in so far as they relate to the subject of payment, are entirely contradicted, as the essence of the allegation in the latter paragraph is that Hagbery did pay to the plaintiffs the full sum of \$2,000, which they thereupon turned back to him as a payment upon the note and mortgage. These allegations are directly contrary to each other; one necessarily infers the negation of the other; both cannot be true; proof of one would disprove the other; they are so completely repugnant as to be self-destructive.

The only object of a lawsuit is the elicitation of the truth, [1] and the only object of pleading is to aid in determining the truth of the controversy. (*Seattle Nat. Bank v. Carter*, 13 Wash. 281, 48 L. R. A. 177, 43 Pac. 332.) The rule is well settled that inconsistency between two or more allegations contained in a single cause of action is fatal if both cannot possibly be true as a matter of fact, and either is essential to make out a sufficient case. (1 Abbott's Trial Briefs, 656; *Reed v. Poin-dexter*, 16 Mont. 294, 40 Pac. 596.) Clearly, no greater latitude in pleading should be allowed to a plaintiff in framing the statement of a single cause of action in a complaint than is permitted to a defendant in setting forth separate defenses in his answer, and this court has held that although a defendant may interpose inconsistent defenses, they must not be so far inconsistent that if the allegations of one are true the allegations of the other must of necessity be false. (*Johnson v. Butte & Superior Copper Co.*, 41 Mont. 158, 48 L. R. A. (n. s.) 938, 108 Pac. 1057; *O'Donnell v. City of Butte*, 44 Mont. 97, 119 Pac. 281.)

If a complaint containing allegations such as these, which are so inconsistent and repugnant that if one is true the other is false, should be held to be a good pleading, it would necessarily follow that it would be competent to introduce evidence to sustain the inconsistent averments, and the plaintiffs would be allowed to assume the absurd position of testifying that they had performed the services for the deceased set forth in their amended complaint, and in one breath to say that he had not paid them therefor in any way or manner, either in money or

property, and in the next breath to solemnly aver that he had paid them in full by giving them credit for the amount upon the note representing the purchase price of the ranch in question. It cannot be contended that such a proceeding would elicit the truth or that such a pleading would aid in determining it.

As the allegation of nonpayment in paragraph IV and the allegation of payment in paragraph VII in effect nullify and destroy each other, the court could not act upon either, but was obliged to disregard both and to construe the pleading as though neither were contained therein. (*State v. Foulkes*, 94 Ind. 493.)

Omitting both the above-mentioned paragraphs from consideration, the amended complaint does not state a cause of action, and it follows that the order sustaining the demurrer thereto was correct, and the judgment of the lower court should be, and the same is, affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

IN RE WADDELL.

(No. 4,171.)

(Submitted April 23, 1918. Decided April 26, 1918.)

[172 Pac. 1036.]

Attorneys—Disbarment—Unprofessional Conduct—Employment by Both Parties to Action—Deceit.

Attorneys—Employment by Both Parties to Action—Disbarment.

1. An attorney who, after consulting with a party to a prospective suit relative to the facts and obtaining a sum of money from him to cover court costs and expenses, accepted employment from the adversary of such party, was by him paid a retainer fee and afterward additional compensation, appeared as attorney of record and assisted in the trial of the cause, returning the money paid by the first party only after complaint had been made to a district judge and some two years after receipt thereof, is guilty of such unprofessional conduct as compels disbarment.

[As to disbarment for acting for party adverse to former client, see note in *Ann. Cas.* 1912B, 214.]

Same—Deceit—Disbarment.

2. An attorney who violated instructions given him by a client relative to the settlement of a claim to the detriment of the client, did not promptly report the settlement when made or remit the amount due the client, and three months and a half after settlement had been made wrote the client that he expected to make settlement in from four to six weeks, merits disbarment.

PROCEEDINGS for the disbarment of John L. Waddell, an attorney at law. Adjudged that the name of accused be stricken from the roll of attorneys and counselors at law.

Mr. Frank Woody, Assistant Attorney General, argued the cause in behalf of the Prosecution.

Mr. Homer G. Murphy, for the Accused, argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

John L. Waddell, an attorney admitted to practice law in this state, was accused by the attorney general of unprofessional conduct in a complaint which contains four charges. After issues were joined, a hearing was had before A. C. Schneider, referee, and a report of the proceedings has been filed in this court. We deem it unnecessary to consider but two of the charges.

1. In May, 1915, Travers Daniel, Jr., wrote to the accused complaining of certain acts of one W. P. Moncure and soliciting [1] advice, and information concerning the terms upon which the accused would undertake to prosecute certain actions for Daniels and his wife against Moncure. Later Daniel and wife conferred personally with the accused, gave to him a statement of the facts concerning their grievances, and paid him \$50 to cover court costs and expenses. The suggestion was made that F. V. H. Collins, of Forsyth, should be secured to assist the accused in handling the business for Daniel and wife. Beginning with June 8, and continuing until November 15, 1915, the accused wrote to Daniel some twelve letters, each referring to the Moncure matters and the actions to be brought for Daniel,

his wife or both of them. A brief reference to some of these letters will serve to illustrate the character of all of them. On June 8 he wrote that he would see Collins and "go into every phase of the case" and would have Daniel and wife come to Hardin "and we will prepare the papers for filing." On June 21 he wrote that he had completed a thorough investigation of the facts "and in a few days I will try to arrange matters here so that I can see one or both of you relative to the signing of necessary papers and other preliminary arrangements before actual filing of the suit." Later in June he wrote that he would see Collins on July 5 or 6, and said further: "I am working on the law as applied to what facts you have given me." On July 30 he wrote: "I am now preparing all three actions for immediate filing." On August 12 he wrote: "The papers in the three cases are now beginning to look like lawsuits and will soon be in the hands of the sheriff." On September 26 he wrote that he had made arrangements with Collins "to get in these cases." On November 15 he wrote that he had prepared tentative drafts of two complaints and was working on a third. About December 8 Daniel and wife withdrew their business from the accused and thereafter employed other counsel, who commenced the actions in the spring of 1916. After Moncure had been served with process he retained the accused as his attorney in the actions, paid him a retainer fee of \$200 and afterward additional compensation. Waddell appeared as attorney of record for Moncure, assisted in the trial of one of the cases and in the settlement of the others, and never returned to Daniel the \$50 he had received in July, 1915, until more than two years later and after Daniel had complained to the judge of the district court.

Notwithstanding this evidence, the accused now denies that he was ever employed or retained by Daniel or his wife, but his denial only adds to his disgrace. The evidence of his employment is conclusive, and his present contention that his employment was contingent upon his receiving a retainer fee is obviously an afterthought. His attempt to shift the responsibility

for his employment by Moncure upon other attorneys is unworthy of any serious consideration. An attorney who is so insensible to the obligations which his profession imposes cannot expect to be permitted to continue to practice in this state.

2. In 1916 the accused received for collection for the Oliver Chilled Plow Works a note executed by C. A. Quarnberg, and [2] an account against Ed. Jenkins. Acting as the attorney for the plow works, the accused commenced an action upon each of these claims and about March 1, 1917, wrote his client that he had an offer of compromise of the Quarnberg matter. In a letter dated March 5, he was authorized to waive any claim for interest and settle upon the basis that Quarnberg pay the principal, costs and attorney fee. On April 19 the accused secured a judgment against Quarnberg for \$172.09 principal; \$95.87 accrued interest; \$7.40 costs, and \$50 attorney fee, and on May 12 he received \$325.36 in full satisfaction of the judgment, and on the same day repaid to Quarnberg \$167 of the amount; in other words, instead of remitting \$95.87, the amount of accrued interest, as he had been authorized to do, he remitted \$167. On May 21, July 20, and August 3, the plow works wrote the accused inquiring concerning the progress made in the Quarnberg matter, but received no reply until August 29, when Waddell wrote:

“In re Quarnberg Matter.

“Beg to advise that we expect to be able to close this matter in full just as soon as the grain on the land of defendant is in the bin or threshed. This might mean four or six weeks.” This letter refers then to the Jenkins claim and concludes: “We will keep in close touch with both of these cases and just as soon as we can do so under the present arrangements we will make remittance.”

On August 24 the accused had collected \$210.60 on the Jenkins account but made no report until October 4, when he wrote: “I beg to say that in the Jenkins judgment we are proceeding as rapidly in our opinion as possible and hope that within a reasonable time we will be able to secure full satisfaction of same.” On October 10 the plow works made a demand upon the accused

for settlement, and on October 16 he remitted \$200, explaining the settlement made in the Quarnberg matter and advising the plow works that the balance collected in the two suits had been retained by him as attorney fees and costs. When called to account for the manner in which he had settled the Quarnberg claim, the accused wrote on November 8: "We settled it exactly upon the letter from you under date of March 5, 1917." Soon afterward the accused was dismissed from the employment of the plow works.

The record discloses beyond controversy that the accused violated his instructions in making settlement of the Quarnberg claim; that the matter was finally settled by him on May 12; that he did not report the settlement or remit the amount due his client; that three and a half months thereafter he wrote his client that he expected to get the claim settled in from four to six weeks. This breach of faith and deceit alone would command his disbarment, but his failure to pay over to his client promptly the money he had collected was equally reprehensible. Such conduct cannot fail to bring reproach upon the legal profession and alienate the favorable opinion which the public should entertain for it.

It is ordered that the name of John L. Waddell be stricken from the roll and that he be disbarred from practicing as an attorney or counselor at law in the courts of this state.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STATE EX REL. INTERSTATE LUMBER CO., RELATOR, v.
DISTRICT COURT ET AL., RESPONDENTS.

(No. 4,212.)

(Submitted April 22, 1918. Decided May 1, 1918.)

[172 Pac. 1030.]

*Supervisory Control—Change of Venue—Actions on Contracts—
Statutory Construction.*

Actions on Contracts—Venue—Statutes and Statutory Construction.

1. Under the rule of statutory construction requiring every word, clause and sentence of a statute to be given effect, if possible, to the end that the different provisions thereof may be made consistent and harmonious and each assigned an intelligent meaning, *held*, that the last sentence of section 6504, Revised Codes, should be read to mean that actions upon contracts *must* (not *may*) be tried in the county in which the contract was to be performed, and actions for torts in the county where the tort was committed.

Statutory Construction—Exceptions.

2. Where it is apparent that the legislature intended to make an exception to a general statutory provision, the words must be so construed even though not expressed technically in the form of an exception.

Venue—Motion for Change—When to be Made.

3. A motion for a change of venue on the ground that the action was not commenced in the proper county must under section 6505, Revised Codes, be made by defendant upon his first appearance.

[As to change of venue, see note in 74 Am. Dec. 241.]

Same—Supervisory Control—Writ Lies, When.

4. In the absence of an appeal from an order directing the erroneous transfer of a cause to another county for trial on motion of defendant, and neither *mandamus*, *certiorari*, nor prohibition being available, supervisory control lies to review the order.

Original application for writ of supervisory control by the State on the relation of the Interstate Lumber Company against the District Court of the First Judicial District in and for the County of Lewis and Clark, and R. Lee Word, a Judge thereof, to annul an order directing the transfer of a cause to the District Court of Silver Bow County. Order annulled.

Mr. Henry C. Smith, for Relator, submitted a brief and argued the cause orally.

Mr. W. D. Rankin and *Mr. R. L. Dick*, for Respondents, submitted a brief; *Mr. Dick* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On February 11 of this year the Interstate Lumber Company, a Montana corporation, brought an action in the district court of Lewis and Clark county against Jake Tyanich to recover the sum of \$130.08, the agreed price of lumber sold and delivered to him between March 29 and April 18, 1916, with interest thereon from the latter date. The defendant appeared in the action by a general demurrer. At the same time he filed a motion asking that the cause be transferred to Silver Bow county for trial, on the ground that at the time the action was commenced and he was served with summons he was a resident of that county. The motion was supported by his own affidavit disclosing the fact of his residence in Silver Bow county and the service of summons there. The plaintiff, not controverting these facts, resisted the motion on the ground that the contract was made in Lewis and Clark county and was to be performed there, and hence that it had the right to bring the action and have it tried in that county. To support this contention it presented an affidavit by Albert Neider, its general manager, which disclosed these facts: That at the time the sale was made, the defendant was engaged in mining near Helena, in Lewis and Clark county; that the lumber was sold to him by the plaintiff at its place of business in Helena and was delivered to him at his mine; and that he used the same in the erection of a building on his mining ground, where the said building now is. The statements contained in this affidavit are not controverted. The court overruled plaintiff's contention and ordered the cause transferred to Silver Bow county. Thereupon the plaintiff made application to this court for an order under its supervisory power, annulling the order transferring the cause and requiring the court to retain it for trial in Lewis and Clark county. In response to an order to show cause issued by this court, the district court appeared by counsel and moved to quash it and dismiss the application upon several grounds, all of which present the same question, *viz.*, whether, upon the facts stated in the

petition heretofore recited, the relator is entitled to the relief demanded. The proceeding was thereupon submitted for decision.

Sections 6501-6503, inclusive, of the Revised Codes, designate in what county an action for any of the causes therein enumerated must be tried, subject to the power of the court to change the place of trial as elsewhere in the Codes provided. Section [1] 6504 provides: "In all other cases, the action shall be tried in the county in which the defendants, or any of them, may reside at the commencement of the action, or where the plaintiff resides, and the defendants, or any of them, may be found; or if none of the defendants reside in the state, or, if residing in the state, the county in which they so reside be unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint; and if any defendant or defendants may be about to depart from the state, such action may be tried in any county where either of the parties may reside, or service be had. Actions upon contracts may be tried in the county in which the contract was to be performed; and actions for torts in the county where the tort was committed; subject, however, to the power of the court to change the place of trial, as provided in this Code."

The first sentence of this section is general in its terms and but for the last sentence in it, would apply to any action whatsoever for a cause other than one of those enumerated in some one of the preceding sections. The place of trial is therein made to depend upon the residence or whereabouts of the defendant at the time the action is commenced. The last sentence, however, excepts out of the application of this general provision, actions upon contract and actions for torts, and requires the place of trial in these cases to be determined by considerations wholly apart from the residence or whereabouts of the defendant. In the one case, the place of trial is determined by an answer to the inquiry: Where was the contract to be performed? And in the other: Where was the tort committed? The use of the permissive auxiliary "may" instead of "must," expressive of obligation or necessity, used in the first sentence, becomes of no significance when we note that under section 6505 an action

for any cause may lawfully be tried in any county unless the defendant asks for a change to the proper county as therein provided. If it should be assigned a permissive force only, it would render the sentence meaningless. This would be in violation of the general rule of construction applicable, *viz.*, that in construing a statute, every word, clause and sentence must be given effect, if it is possible to do so, to the end that its different provisions may be made consistent and harmonious and each be assigned an intelligent meaning (*State ex rel. Anaconda C. M. Co v. District Court*, 26 Mont. 396, 68 Pac. 570, 69 Pac. 103; *Stadler v. City of Helena*, 46 Mont. 128, 127 Pac. 454; 36 Cyc. 1128). On the other hand, if it be given the same force as that of the auxiliary *must*, the sentence becomes harmonious and consistent with the rest of the section and thus expressive of a definite intention of the legislature in enacting it, to except out of the scope of the general statement in the first sentence the two classes of cases mentioned. We therefore hold that it should be [2] given the force of *must*. True, the sentence is not expressed technically in the form of an exception, but mere form of expression is not important when the purpose intended and sought to be accomplished by the legislature is ascertainable and made reasonably certain by applying the rule of construction referred to. (36 Cyc. 1106, 1107.)

To determine, then, whether an action in either of these two classes has been commenced in the proper county, the only question the court may consider and determine is where in the one case the contract was to be performed, or, in the other, where the tort was committed. As will appear below, our own decisions are not in harmony, but in two of them at least this court impliedly adopted the construction we have given the last sentence of the section, by refusing to recognize the residence of the defendant as a material consideration. (*Oels v. Helena & Livingston Smelting & R. Co.*, 10 Mont. 524, 26 Pac. 1000; *State ex rel. Coburn v. District Court*, 41 Mont. 84, 108 Pac. 144.) The first of these cases was an action for damages for an injury sustained by an employee of a corporation doing business in

Jefferson county. The defendant moved to have the action transferred for trial to Lewis and Clark county, on the ground that at the time it was commenced defendant was a resident of Lewis and Clark county and had been served with summons there. The district court overruled the motion. This court, after expressing a doubt whether the cause of action arose out of contract or tort, held that this inquiry was wholly immaterial, because it appeared that, if it arose out of contract, the contract was to be performed in Jefferson county, and if out of tort, that the tort had been committed there, and that the motion was properly denied. The second case was an application to this court for a writ of prohibition to restrain the district court of Broadwater county from proceeding further in an action brought by plaintiff to recover wages for work and labor done for the defendant in that county, after it had denied the motion of defendant asking that the cause be transferred to Lewis and Clark county, the place of his residence. This court held that the place of performance of the contract determined the place of trial, and, since it appeared that it was to be performed—that is, payment was to be made—in Broadwater county, the proper place of trial was in that county. The writ was accordingly denied. It is not controverted that the contract in question here was made in Lewis and Clark county and that it was to be performed—that is, payment was to be made—by defendant at the plaintiff's place of business there. Hence these cases directly sustain the relator's right to have the action tried in Lewis and Clark county, subject, however, to the power of the court to order it transferred to some other county for one of the reasons enumerated in one of the last three subdivisions of section 6506.

Counsel for defendant cites and relies upon three other decisions of this court, assuming that they fully sustained the order of transfer made in this case. We concede that they do, but hold that they are based upon a misconception of the intention of the legislature in formulating the statute. These are: *Wallace v. Owsley*, 11 Mont. 219, 27 Pac. 790, *McDonnell v. Collins*, 19 Mont. 372, 48 Pac. 549, and *Bond v. Hurd*, 31 Mont. 314, 3

Ann. Cas. 566, 78 Pac. 579. The first was an action on an account for goods, wares and merchandise sold and delivered to defendant in Lewis and Clark county. The court held that since it did not appear from the complaint where the contract was to be performed and the affidavits of the respective parties were in conflict, the district court erred in refusing to order a transfer of the action for trial to Silver Bow county, the place of defendant's residence—thus bringing the case within the general provision of the statute, instead of within the scope of the exception. The second was also an action on an account. No inquiry was made as to where the contract was to be performed. The court held that the action should be transferred from Fergus county, where it had been commenced, to Cascade county, on the sole ground that the defendants resided and had been served with summons in that county. In the third case, the complaint contained three causes of action on contract, the first and second of which were on open accounts, the allegations in the third count leaving it doubtful whether it was upon an open account or upon an express contract. The action had been begun in Beaverhead county, where the plaintiff resided. The defendant resided and had been served with summons in Valley county. The district court of Beaverhead county denied defendant's demand for a change of place of trial to Valley county. On appeal to this court the final judgment was reversed on the ground, among others, that the court erred in refusing to transfer the action. Incidentally it expressed the opinion that the last sentence of section 6504 applies to actions on express contracts only and does not include actions on implied contracts. This was clearly erroneous. The term "contract," as used in the statute, not being limited in meaning either by the context or by any qualifying word, must be accepted in its broadest signification and as including every kind of contract, whether express or implied. The error in these decisions was doubtless due to a lack of careful attention by court and counsel to the statute. They were all based upon decisions by the supreme court of California construing the statute of that state, our

court evidently having overlooked the purport of the last sentence of the section of our own statute which is not found in the corresponding section of the California statute. (Cal. Code Civ. Proc., sec. 395.) We improve this opportunity to call attention to them so that the confusion resulting from them may be cleared away.

We think we have noticed all the decisions which are not in harmony with the conclusion herein expressed. So far as they are not, they are specifically overruled.

The contention is made by counsel for the defendant court that a defendant in the particular action has the right to have his motion for a change of place of trial determined upon the condition in which the action is at the time he first appears [3] therein. It is true that the motion, to be available on the ground that the action has not been commenced in the proper county, must be made by defendant upon his first appearance (sec. 6505, Rev. Codes). It is true, also, that he may not be defeated in his motion by a counter-motion by plaintiff upon a ground that would entitle him to a change from the county to which defendant had demanded that a change be made, as, for illustration, on the ground of convenience of witnesses, or because of prejudice existing in the people, by reason of which he cannot have a fair and impartial trial. (*Wallace v. Owsley, supra; State ex rel. Stephens v. District Court*, 43 Mont. 571, Ann. Cas. 1912C, 343, 118 Pac. 268.) There is no basis, however, for the contention in this case. It may be conceded that an action on a contract which was to be performed outside of the state should be commenced in the county of defendant's residence, and if not commenced there, may be removed there upon his application; yet since under the only meaning which can be assigned to the last sentence of section 6504, *supra*, the plaintiff is entitled to bring his action in the county where the contract was to be performed, if the place of performance does not appear from the complaint, there is no valid reason why he may not defeat defendant's motion for a transfer of the action to the county of his residence by showing by affidavit that the contract was to be performed where the action was commenced.

Lastly, contention is made that the supervisory power of this [4] court should not be exercised in this case, for the reason that it does not appear that the plaintiff has suffered or will suffer any prejudice because of the order complained of. This contention must be overruled. There is no direct appeal from the order (Rev. Codes, sec. 7098). Neither is there remedy by *mandamus* (*State ex rel. Independent Pub. Co. v. District Court*, 23 Mont. 329, 58 Pac. 867; *State ex rel. Woodward v. District Court*, 53 Mont. 358, 163 Pac. 1149); and since the court below had jurisdiction to entertain and determine the motion, error in its conclusion was not such an excess of jurisdiction as to render either *certiorari* or prohibition available. In the ordinary course of law the plaintiff would be compelled to go to Silver Bow county and submit to a trial there, suffering the additional expense and inconvenience thus made necessary—an injustice for which, though he should recover judgment in the action, he could recover no compensation.

The order is annulled.

Order annulled.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

HAMMOND, RESPONDENT, v. THOMPSON ET AL., APPELLANTS.

(No. 4,168.)

(Submitted April 29, 1918. Decided May 13, 1918.)

[00 Pac. 000.]

Claim and Delivery—Pleading and Practice—Counterclaim—Wrongful Detention—Measure of Damages—Instructions—Disregard by Jury—New Trial.

Pleading and Practice—Counterclaim—Nature of Pleading.

1. A counterclaim must be in existence and matured for action at the time of the commencement of the suit in which it is pleaded.

[As to scope and office of counterclaim under the Codes, see note in 89 Am. Dec. 482.]

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Claim and Delivery—Detention of Property—Measure of Damages—"Usable Value."

2. In a claim and delivery action the measure of damages for the wrongful detention of property having a usable value, as distinguished from its value for sale or consumption, is the reasonable value of its use from the date of seizure to the time of trial, provided there is no allegation of special damages and the party claiming damages had the right to use the property, was in a situation to use it and could have done so but for the wrongful acts of defendant.

Same—Damages—Evidence—Insufficiency.

3. Evidence *held* insufficient to justify an award of damages for more than nominal damages for the wrongful detention of hotel and saloon furnishings.

Verdict Against Law—Instructions—Disregard by Jury.

4. A verdict rendered contrary to the court's instruction is against law and will be set aside.

Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.

ACTION by Milton Hammond against James Thompson and another. From an order granting plaintiff a new trial, defendants appeal. Affirmed.

Mr. S. J. Bischoff, for Appellants, submitted a brief and argued the cause orally.

Messrs. O'Hara & Madeen and *Mr. J. D. Taylor*, for Respondent, submitted a brief; *Mr. Robt. A. O'Hara* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was instituted by plaintiff to secure possession of certain personal property used in and about the conduct of a hotel and saloon. Some of the property described in the complaint was seized by the sheriff and delivered to the plaintiff. The defendants by answer denied plaintiff's title or right of possession, asserted title in themselves, claimed a return of the property seized, and damages for the wrongful detention.

Upon the trial plaintiff failed to make out his case and a nonsuit was granted. The trial proceeded upon the affirmative defense—so-called counterclaim—and the reply thereto, resulting

in findings in favor of defendants, one of which assessed the damages for the wrongful seizure and detention at \$600. Plaintiff moved for a new trial and the court directed that the motion be granted unless within thirty days, defendants remitted the amount of the damages. This they refused to do and appealed from the order when it became absolute.

1. The claim for damages arising from the wrongful seizure [1] and detention of the property in controversy is not in any sense a counterclaim within the meaning of section 6541, Revised Codes, since it rose after the commencement of this action. A counterclaim must be one existing and matured for action in favor of the party asserting it, at the time of the commencement of the action in which it is pleaded. (*McGuire v. Edsall*, 14 Mont. 359, 36 Pac. 453; *Scott v. Waggoner*, 48 Mont. 536, L. R. A. 1916C, 491, 139 Pac. 454.)

Sections 6760 and 6803, Revised Codes, recognize the right of the defendant in a claim and delivery action, who is awarded a [2] return of the property, to recover damages for the wrongful taking and detention of it. Such damages are merely incident to the right of return, but must be claimed in order to be recovered, and though the pleading is not a counterclaim, it is subject to the general rules which govern a complaint in an action for damages. In the absence of any allegation of special damages, the measure of damages for the wrongful detention of property which has a usable value, as distinguished from its value for sale or consumption, is the reasonable value of its use from the date of seizure to the time of the trial (*Morgan v. Reynolds*, 1 Mont. 163; *Gans v. Woolfolk*, 2 Mont. 458; *Chauvin v. Valiton*, 8 Mont. 451, 3 L. R. A. 194, 20 Pac. 658; *Chesnut v. Sales*, 49 Mont. 318, Ann. Cas. 1916A, 620, 52 L. R. A. (n. s.) 1199, 141 Pac. 986), and ordinarily "usable value" means the amount for which such property could be hired. (*Alexander v. Bishop*, 59 Iowa, 572, 13 N. W. 714.) This rule is peculiar to actions in replevin. It applies, however, only in cases where the party claiming such damages had the right to use the property, was in a situation to use it, and could have done so but for the

wrongful acts of the other. (Wells on Replevin, sec. 580; Ann. Cas. 1914A, note 381.)

The only evidence offered by defendants in support of their [3] claim for damages was to the effect that the gross receipts from the hotel prior to the seizure were from \$150 to \$175 per month and the profits about \$50 per month, and that the gross receipts from the saloon amounted to about \$300 per month and the profits were about \$150 per month. This evidence fails to make out a case within the rules above, for more than nominal damages, in that it furnishes no criterion by which the jury could determine the usable value of the property seized, which was only a portion of the furnishings of either building. Furthermore, the evidence discloses that sufficient furnishings were left in the hotel to accommodate defendants' business so far as the sleeping-rooms were concerned, and that they had voluntarily closed the dining-room and saloon before the seizure.

2. The order was justified for another reason. The jury found the value of the property seized to be \$379.75, and in [4] addition found the damages for its wrongful detention to be \$600. Without objection the court gave Instruction No. 4, as follows: "The court instructs the jury that in this case they are only to take into consideration the reasonable value of the property, no other element of any damage alleged in the counterclaim having been proven." This became the law of the case, binding upon the jury, and the verdict for damages for wrongful detention was contrary to this instruction and against law. (*Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057; *Wallace v. Weaver*, 47 Mont. 437, 133 Pac. 1099.) If it be said that other instructions authorized the jury to return a verdict for damages, it is sufficient reply to say that such conflict in the instructions was only an additional reason for setting the verdict aside.

The order is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

MASTERSON ET AL., RESPONDENTS, v. HUBBERT, APPELLANT.

(No. 4,213.)

(Submitted April 30, 1918. Decided May 16, 1918.)

[00 Pac. 000.]

Receivers—Partnership—Dissolution—Improper Appointment—Notice.**Receivers—Appointment Without Notice—Purpose.**

1. To justify the appointment of a receiver without notice, it must be made to appear, under section 6699, Revised Codes, that the delay resulting from giving notice would defeat the very right which plaintiff seeks to protect or imperil the property involved in the litigation.

Same—Partnership—Dissolution—Improper Appointment.

2. False representations claimed to have been made by defendant at the time of the formation of the partnership which plaintiff sought to have dissolved, that he owned certain personal property and deceived plaintiff as to the rental value of the premises occupied by the parties, was not a sufficient ground for the appointment of a receiver.

Same.

3. A receiver should not be appointed because of quarrels or disagreements between partners, in the absence of allegation that the lack of harmony injuriously affects the business of the partnership.

[As to when the appointment of a receiver is proper, see note in 72 Am. St. Rep. 29.]

Same.

4. Appropriation by one member of a partnership of its common funds does not warrant the appointment of a receiver, where it is not made to appear that the funds will ultimately be lost and that defendant is insolvent.

Same—Partnership—Purpose of Appointment.

5. The purpose of appointing a receiver as ancillary relief in an action for the dissolution of a partnership is to prevent the member at fault dissipating the common property and thereby defeating the object of the suit.

Same—How Power of Appointment to be Exercised.

6. The power to appoint a receiver should be exercised sparingly, with extreme caution, and only to prevent manifest wrong immediately impending, or in case it is made to appear clearly that plaintiff is in danger of suffering irreparable injury and there is no other plain, speedy or adequate remedy available.

Same—Partnership—Improper Appointment.

7. Where a partnership was prosperous, had no debts and plaintiffs were not ousted or denied participation in the management and control of the business, the appointment of a receiver without notice pending settlement of a dissolution suit was improper, the only substantial ground alleged being that plaintiffs were not receiving their full share of the partnership profits and that certain funds were being misappropriated by defendant.

Appeal from District Court, Hill County; W. B. Rhoades, Judge.

ACTION by T. W. and Naomi Masterson against E. J. Hubbert. From an order appointing a receiver without notice, defendant appeals. Reversed.

Messrs. Donnelly & Carleton, for Appellant, submitted a brief; *Mr. Jos. P. Donnelly* argued the cause orally.

Where there is no danger of the property being lost and the partner applying to the court for a receiver himself has the property—which is the case here for aught that appears in the complaint—and his copartners make no objection thereto, he cannot have a receiver, his standing being that of a party asking a receiver over his own property. (*Smith v. Lowe*, 1 Edw. Ch. (N. Y.) 33.) It is likewise the law that where no insolvency is alleged, or possibility of loss shown, the mere fact that one partner has in his possession large sums of the partnership funds is not of itself cause for the appointment of a receiver. (*Wellman v. Harker*, 3 Or. 253.) In *Heinze v. Kleinschmidt*, 25 Mont. 90, 63 Pac. 927, this court held that where a cotenant went into possession of mining property by consent of his cotenant with the understanding he was at liberty to engage in mining, nothing short of a clear ouster and refusal to account, coupled with insolvency, would justify the court in taking the property from him through the agency of a receiver. The complaint here is devoid of any allegations even remotely tending to show an ouster of the respondents from the business, or insolvency on the part of appellant. As far as this complaint is concerned, the presumption is that respondents are in possession, assuming they are partners in the business. A partner in possession is never allowed a receiver. (High on Receivers, sec. 490.) Mere quarrels between partners, assuming, of course, that these parties are partners, is not sufficient ground for the appointment of a receiver. (*Id.*, sec. 474.)

In any event the court abused its discretion in appointing a receiver without notice to the defendant. (*State v. Clancy*, 20 Mont. 284, 50 Pac. 852.) The case of *Pyeatt v. Prudential Ins. Co.*, 38 Okl. 15, Ann. Cas. 1915C, 894, 131 Pac. 914, contains an

exhaustive discussion and citation of authority upon the question under discussion.

The agreement between the parties in this cause did not create a partnership *in praesenti*, but that the most that can be said of it is that it was an agreement to form a partnership in the future. Where there is only an agreement to form a partnership a receiver should not be allowed. (High on Receivers, secs. 476, 477; see, also, *Cudahy Packing Co. v. Hibou*, 92 Miss. 234, 18 L. R. A. (n. s.) 975, 46 South. 73.)

The appointment of a receiver in this case was error under any theory, for the court had the power to grant a temporary restraining order until such time as the application for a receiver could be heard with notice. (*Henderson v. Reynolds*, 168 Ind. 522, 11 Ann. Cas. 977, 11 L. R. A. (n. s.) 960, 81 N. E. 494; *Fischer v. Superior Court*, 110 Cal. 129, 42 Pac. 562.) Respondents also hold an adequate remedy in an action for breach of contract or cancellation thereof and damages, in which event receivership does not lie. (High on Receivers, sec. 10.)

Mr. Thos. D. Long, for Respondents, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In September, 1917, plaintiffs and defendant entered into a contract in writing by the terms of which plaintiffs agreed to pay defendant \$3,491.93 for a one-half interest in a restaurant business in the city of Havre. The sum of \$1,150 was paid in cash and the balance was represented by four notes, each for \$500 and one note for \$341.93, due, respectively, in two, four, six, eight and ten months. In February, 1918, plaintiffs commenced this action and in their complaint allege that by the agreement a partnership was formed; that plaintiffs entered into possession and control of the business with defendant and have continued in such possession and control; that they have realized as their proportion of the profits, the sum of \$1,000 which has

been applied to the discharge of their first two notes under the terms of the agreement; that the business is profitable and, if properly conducted, will increase in volume and value; that defendant made certain false representations concerning some of the property; that he has abused plaintiffs, treated them with disrespect and refuses to talk with them; that he has appropriated to his own use \$700 over and above his just proportion of the partnership profits; that he continues to appropriate partnership property to his individual use and benefit, and refuses to account. The prayer is for a dissolution of the partnership, for an accounting and, as ancillary relief, for the appointment of a receiver. Upon this complaint alone and before summons had been served, the trial court appointed a receiver without notice, and defendant appealed from the order.

For the purpose of this appeal only we assume that the allegations of the complaint are true and that sufficient facts are stated to warrant a dissolution and an accounting. Section 6698, Revised Codes, authorizes the appointment of a receiver in an action "between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed or materially injured." Section 6699 requires that notice [1] of the application must be given the adverse party unless "it shall appear to the court that there is immediate danger that the property or fund will be removed beyond the jurisdiction of the court, or lost, materially injured, destroyed or unlawfully disposed of." In other words, to justify the appointment without notice, it must be made to appear that the delay resulting from giving notice would defeat the very right which plaintiffs seek to protect, or imperil the property involved in the litigation. (*State v. Clancy*, 20 Mont. 284, 50 Pac. 852.) To give notice would involve a delay of only five days at the utmost, which period might be shortened by the court or judge (sec. 7141, Rev. Codes).

What, then, is the emergency disclosed by the complaint which does not brook delay for the brief period necessary to give notice?

(a) It is alleged that at the time the contract was entered [2] into, defendant falsely represented that he owned the cash register in the restaurant and the electric sign in front of it and deceived the plaintiffs as to the rental paid for the premises; but it is not contended that by reason thereof a delay of a few days will work prejudice to plaintiffs' interest. Such a representation, if relied upon by plaintiffs to their injury, might be made the foundation for a rescission of the contract, but it furnishes no ground for the appointment of a receiver.

(b) It is alleged that defendant has treated plaintiffs with [3] abuse and disrespect and refuses to talk with them. But courts of equity will not interfere merely because of quarrels or disagreements between persons jointly interested in business (High on Receivers, 4th ed., sec. 474), and it is not one of the functions of a receiver to establish or maintain the *entente cordiale* between partners. It is not alleged that this lack of harmony injuriously affects the business; on the contrary, it is alleged that it is proceeding successfully.

(c) Finally, it is charged that the defendant has appropriated [4] and continues to appropriate to his individual use funds and other property belonging to the partnership. As a general partner the defendant has the right to participate in the management and control of the business (sec. 5482, Rev. Codes), and while his fraudulent misappropriation of the common funds would furnish justification for a dissolution of the partnership and for an accounting, it is not sufficient ground for the appointment of a receiver that he has in his hands funds of the firm for which he refuses to account, in the absence of a showing that there is danger that money in which plaintiffs are interested will ultimately be lost to them, and particularly in the absence of any allegation that defendant is insolvent and unable to respond for the amount found due upon an accounting. (High on Receivers, sec. 497.)

The remedy here sought is an extraordinary one, never available except upon a showing of necessity. (*Prudential Securities Co. v. Three Forks etc. R. Co.*, 49 Mont. 567, 144 Pac. 158.) If the defendant is solvent—and there is no allegation that he is not—a receiver would serve no purpose which could not be subserved equally as well in the due course of this litigation in the enforcement of whatever decree may be entered.

The purpose of appointing a receiver in an action of this [5] character is to prevent the partner at fault dissipating the common property and thereby defeating the object of the suit. (20 R. C. L. 962.) It is not the province of a court through its receiver to become the general manager of private enterprise or conduct the business of a partnership. (*Murphy v. Patterson*, 24 Mont. 591, 63 Pac. 380.) Where the appointment is made before final adjudication upon the merits, as in this instance, it amounts in effect to the levy of an execution *in limine*, entailing expense and other hardships often out of proportion to the value of the right sought to be protected (*Hickey v. Parrot Silver & Copper Co.*, 25 Mont. 164, 64 Pac. 330), and for [6] this reason the power should be exercised sparingly, with extreme caution, and only to prevent manifest wrong immediately impending, or in case it is made to appear clearly that the complaining party is in danger of suffering irreparable injury and there is no other plain, speedy or adequate remedy available. (*Montana Ranches Co. v. Dolan*, 53 Mont. 397, 164 Pac. 306.)

There is not any allegation that this partnership has any [7] debts, and therefore the receivership could not be employed for the benefit of creditors that they might come in *pari passu* and share equitably in the distribution of the proceeds. The only substantial ground of complaint is that plaintiffs are not receiving their full share of the partnership profits and that certain funds are being misappropriated. It is not alleged that they have been ousted or denied participation in the management and control of the business; on the contrary, the complaint

discloses affirmatively that plaintiffs are in possession of, and are actively engaged in managing, the business with defendant, and that the enterprise is being conducted successfully. There is therefore no ground for appointing a receiver, since plaintiffs are authorized to protect their interests fully and to realize on firm assets their just proportion of the profits. (Sec. 5482, Rev. Codes; High on Receivers, sec. 490.)

The order is reversed.

Reversed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

MEMORANDA

OF

DECISIONS RENDERED WITHOUT EXTENDED OPINIONS DURING THE PERIOD EMBRACED IN THIS VOLUME.

No. 4,065.—IN RE LIZZIE MAKE.

APPLICATION for writ of *habeas corpus*.

Decided June 7, 1917.

PER CURIAM.—The application for a writ of *habeas corpus*, this day presented to the court, is, after due consideration, denied.

Mr. D. H. Wittenberg, for Complainant.

No. 3,908.—CITY OF LEWISTOWN, APPELLANT, v. J. C. DUNN, RESPONDENT.

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

Decided June 18, 1917.

PER CURIAM.—Pursuant to stipulation of the parties herein, the appeal in this cause is this day dismissed.

Messrs. I. B. Kirkland and Oscar O. Mueller, for Appellant.

Mr. Chas. J. Marshall, for Respondent.

No. 4,069.—STATE EX REL. BOARD OF RAILROAD COMMISSIONERS, RELATOR, v. J. H. HALL, RESPONDENT.

Original application for writ of injunction.

Decided June 23, 1917.

PER CURIAM.—Motion to quash the temporary injunction issued in this cause having been duly argued by counsel, it was after due consideration overruled; and counsel for respondent declining to make further appearance, the court ordered that a peremptory writ issue enjoining respondent from acting or attempting to act as chairman of the board of railroad commissioners.

Messrs. Galen & Mettler, for Relator.

Mr. H. C. Hall, for Respondent.

No. 4,014.—AMBROSE McFARLAND, RESPONDENT, v. J. J. WELCH ET AL., APPELLANTS.

Appeal from District Court, Missoula County; Theo. Lentz, Judge.

Decided July 2, 1917.

PER CURIAM.—Upon motion of appellants herein, the appeal in the above-entitled cause is hereby dismissed.

Messrs. Mulroney & Mulroney, for Appellants.

Mr. Harry H. Parsons and *Mr. S. J. Bishoff*, for Respondent.

No. 3,792.—JOHN I. KOSKIE, APPELLANT, v. ANACONDA
COPPER MIN. CO., RESPONDENT.

*Appeal from District Court of Cascade County; H. H. Ewing,
Judge.*

Decided July 3, 1917.

PER CURIAM.—The appeal in this cause is this day dismissed pursuant to stipulation of the parties.

Mr. W. F. O'Leary, for Appellant.

Messrs. Stephenson, Cooper & Hooper, for Respondent.

No. 4,061.—E. L. CHAPMAN, RESPONDENT, v. MILES J. CAV-
ANAUGH, TRUSTEE, APPELLANT.

*Appeal from District Court, Silver Bow County; J. B. Mc-
Clerman, Judge.*

Decided July 5, 1917.

PER CURIAM.—The appeal herein is, upon motion of respondent, dismissed.

Mr. Miles J. Cavanaugh and J. A. Poore, for Appellant.

Mr. Jas. E. Murray, for Respondent.

No. 3,871.—ARCHIBALD A. MCKINLEY, RESPONDENT, v. T. F. DANAHER, APPELLANT.

Appeal from District Court, Missoula County; A. L. Duncan, Judge.

Decided July 6, 1917.

PER CURIAM.—On motion of appellant, the appeal in the above-entitled cause is hereby dismissed.

Mr. Robert C. Stong, for Appellant.

Mr. Harry H. Parsons, for Respondent.

No. 3,907.—M. E. KOST ET AL., RESPONDENTS, v. MONTANA CON. GOLD MIN. CO. ET AL., APPELLANTS.

Appeal from District Court, Park County; Albert P. Stark, Judge.

Decided September 10, 1917.

PER CURIAM.—In accordance with stipulation of the parties herein, the appeal is dismissed.

Mr. J. E. Healy, for Appellants.

Mr. Fred L. Gibson and Messrs. Walsh, Nolan & Scallon, for Respondents.

No. 4,020.—M. M. KEMPER ET AL., RESPONDENTS, v. MRS. JOHN SULLIVAN, APPELLANT.

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

Decided September 10, 1917.

PER CURIAM.—Upon motion of appellant herein, the appeal in this cause is hereby dismissed.

Messrs. Nolan & Donovan, for Appellant.

No. 4,048.—JOSEPH LOULA, RESPONDENT, v. CHICAGO, MIL. & ST. PAUL RY. CO., APPELLANT.

Appeal from District Court, Gallatin County.

Decided September 10, 1917.

PER CURIAM.—Pursuant to stipulation of parties, the appeal in this cause is hereby dismissed.

Mr. W. S. Hartman, for Appellant.

No. 4,105.—STATE EX REL. CHINOOK-CLEVELAND TEL. CO. ET AL., RELATORS, v. DISTRICT COURT ET AL., RESPONDENTS.

Original application for writ of supervisory control.

Decided September 10, 1917.

PER CURIAM.—Petition for writ of supervisory control herein is, after due consideration, denied.

Mr. R. E. O'Keefe, for Relators.

No. 4,019.—LOUIS E. BARRICK, RESPONDENT, *v.* JOHN R. PORTER, APPELLANT.

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

Decided October 2, 1917.

PER CURIAM.—On motion of respondent herein, the appeal from the order of the district court of November 22, 1916, overruling motion to set aside execution, is hereby dismissed.

Mr. E. K. Cheadle, for Appellant.

Messrs. Blackford & Huntoon, for Respondent.

No. 3,877.—NORTHERN PACIFIC RY. CO., RESPONDENT, *v.* BUTTE ELECTRIC RY. CO., APPELLANT.

Appeal from District Court; John B. McClernan, Judge.

Decided October 2, 1917.

PER CURIAM.—Pursuant to stipulation of parties herein, the appeal in this cause is ordered dismissed.

Mr. Peter Breen, Messrs. Shelton & Furman, and Mr. A. J. Verheyen, for Appellant.

Messrs. Gunn, Rasch & Hall and Messrs. Walker & Walker, for Respondent.

No. 4,085.—DORA SURMAN ET AL., APPELLANTS, v. RICHARD CRUSE ET AL., RESPONDENTS.

Appeal from District Court, Lewis & Clark County; J. Miller Smith and W. H. Poorman, Judges.

Decided October 2, 1917.

PER CURIAM.—Respondent's motion to dismiss appeal from the judgment herein is this day granted and said appeal is hereby dismissed.

Mr. W. D. Rankin, for Appellants.

Messrs. Walsh, Nolan & Scallon, for Respondents.

No. 4,098.—STATE EX REL. JOHN T. MURPHY, JR., RELATOR, v. DISTRICT COURT ET AL., RESPONDENTS.

Original application for writ of supervisory control to the District Court of Lewis and Clark County, and W. H. Poorman, a Judge thereof.

Decided October 3, 1917.

PER CURIAM.—The petition of relator herein for a writ of supervisory control is hereby denied.

Messrs. Walsh, Nolan & Scallon and Mr. Frederick H. Drake, for Relator.

No. 4,116.—STATE EX REL. SECURITY TRUST & SAVINGS BANK, RELATOR, v. DISTRICT COURT ET AL., RESPONDENTS.

Original application for writ of *mandamus* to the District Court of Blaine County, and John A. Matthews, Judge presiding.

Decided October 3, 1917.

PER CURIAM.—The application of the relator herein for writ of *mandamus* is, after due consideration by the court, denied.

Messrs. McKenzie & McKenzie, for Relator.

No. 3,801.—THOS. SHANKS, APPELLANT, v. HELENA CAB CO. ET AL., RESPONDENT.

Appeal from District Court, Lewis & Clark County; R. Lee McCulloch, Judge presiding.

Decided October 3, 1917.

PER CURIAM.—The appeal in this cause is dismissed pursuant to stipulation of the parties herein.

Messrs. Carleton & Carleton, for Appellant.

Messrs. Wm. Wallace, Jr., John G. Brown, and T. B. Weir, for Respondents.

No. 4,088.—HATTIE POWERS, RESPONDENT, v. CHICAGO, MIL. & ST. PAUL RY. CO., APPELLANT.

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

Decided October 15, 1917.

PER CURIAM.—Pursuant to stipulation of counsel for the parties herein, the appeal in the above-entitled cause is hereby dismissed.

Mr. Chas. J. Marshall, for Appellant.

Mr. E. K. Cheadle, for Respondent.

No. 4,077.—LIVINGSTON WATER WORKS, APPELLANT, v. CITY OF LIVINGSTON ET AL., RESPONDENTS.

Appeal from District Court, Park County.

Decided October 16, 1918.

PER CURIAM.—Respondent's motion to dismiss the appeal herein is hereby granted and the appeal ordered dismissed.

Messrs. Miller, O'Connor & Miller and Messrs. Smith, Gibson & Smith, for Appellant.

Mr. Edward Horsky, Mr. Frank Arnold and Mr. R. L. Mitchell, for Respondents.

No. 4,123.—STATE *EX REL.* WM. O'MALLEY, RELATOR, *v.* DISTRICT COURT ET AL., RESPONDENTS.

Original application for writ of supervisory control against the District Court of Silver Bow County and J. V. Dwyer, a Judge thereof.

Decided October 20, 1917.

PER CURIAM.—Relator's application for a writ of supervisory control is after due consideration by the court denied.

Mr. Edwin M. Lamb and Mr. William Meyer, for Relator.

No. 4,129.—STATE *EX REL.* ROY STEPHENSON, RELATOR, *v.* DISTRICT COURT ET AL., RESPONDENTS.

Original application for writ of review to the District Court of the Fifth Judicial District and Jos. C. Smith, a Judge thereof.

Decided October 31, 1917.

PER CURIAM.—Relator's petition for writ of review is this day denied.

Mr. Harlow F. Pease, for Relator.

No. 3,750.—STATE, APPELLANT, v. HATTIE BULEN, RESPONDENT.

Appeal from District Court, Ninth Judicial District; Ben B. Law, Judge.

Decided November 23, 1917.

PER CURIAM.—Pursuant to appellant's *præcipe*, the appeal in the above-entitled cause is hereby dismissed.

J. B. Poindexter, Attorney General, and *Mr. C. S. Wagner*, Assistant Attorney General, for Appellant.

Mr. W. D. Rankin, for Respondent.

No. 3,842.—FREDA E. AUSTIN, RESPONDENT, v. HELENA CAB CO., APPELLANT.

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

Decided December 4, 1917.

PER CURIAM.—Pursuant to stipulation of the parties herein, the appeal in the above-entitled cause is this day dismissed.

Mr. William Wallace, Jr., *Mr. John G. Brown*, and *Mr. T. B. Weir*, for Appellant.

Mr. E. D. Phelan, for Respondent.

No. 4,154.—IN RE APPEAL OF A. J. BISHOP.

Appeal from District Court, Missoula County.

Decided December 17, 1917.

PER CURIAM.—The motion of respondent board of county commissioners to dismiss the appeal herein is granted, and the appeal is accordingly ordered dismissed.

Mr. F. R. Angevine and Mr. Frank Woody, for Appellant.

Mr. Wm. F. Wayne and Mr. Elmer E. Hershey, for Respondent.

**No. 3,994.—STATE, RESPONDENT, v. WILLIAM ELLIS,
APPELLANT.**

Appeal from District Court, Beaverhead County; Jos. C. Smith, Judge.

Decided January 4, 1918.

PER CURIAM.—Pursuant to stipulation of parties herein, the appeal is hereby dismissed.

Mr. C. B. Nolan, for Appellant.

Mr. S. C. Ford, Attorney General, and Mr. Frank Woody, Assistant Attorney General, for Respondent.

No. 3,854.—J. L. SANBORN, APPELLANT, *v.* A. C. ALCORN
ET AL., RESPONDENTS.

*Appeal from District Court, Yellowstone County; Geo. W.
Pierson, Judge.*

Decided January 5, 1918.

PER CURIAM.—Pursuant to stipulation of the parties, the
appeal in the above-entitled cause is hereby dismissed.

Mr. C. B. Nolan and Mr. Robt. C. Stong, for Appellant.

Mr. J. L. Davis and Mr. J. B. Poindexter, for Respondent.

No. 4,121.—CENTRAL MONTANA INV. CO., RESPONDENT, *v.*
WALTER J. SNODDY, APPELLANT.

*Appeal from District Court, Yellowstone County; Geo. W.
Pierson, Judge.*

Decided January 5, 1918.

PER CURIAM.—Respondent's motion to dismiss the appeal
herein is hereby granted, and said appeal is dismissed without
prejudice, subject to reinstatement for good cause shown.

Mr. Wm. V. Beers, for Appellant.

Mr. M. L. Parcels, for Respondent.

Nos. 4,179 and 4,181.—JAMES W. SPRINKLE, RESPONDENT, *v.*
MOSES ANDERSON ET AL., APPELLANTS.

Decided February 20, 1918.

PER CURIAM.—Upon motion of respondent, the appeals in
the above causes are dismissed.

Messrs. O'Keefe & Utter, for Respondent.

No. 4,156.—JEANETTE G. WILBER, RESPONDENT, *v.* R. W.
WILBER ET AL., APPELLANTS.

Appeal from District Court of Toole County; H. H. Ewing,
Judge.

Decided February 20, 1918.

PER CURIAM.—Pursuant to motion of appellants herein,
the appeal in this cause is dismissed.

Messrs. O'Keefe & Utter, for Appellants.

Messrs. Stranahan & Stranahan, for Respondent.

No. 4,173.—LOTTIE G. SCHELZE, RESPONDENT, *v.* ROBERT
G. SCHELZE, APPELLANT.

Appeal from District Court, Sweetgrass County; Albert P.
Stark, Judge.

Decided February 26, 1918.

PER CURIAM.—Respondent's motion to dismiss the appeal
herein is granted and the appeal ordered dismissed.

Mr. A. G. Rosenbaum and *Mr. Harry Meyer*, for Appellant.

Messrs. Smith, Gibson & Smith and *Mr. Frank Arnold*, for
Respondent.

No. 4,191.—JUDITH HARDWARE CO., RESPONDENT, v.
ANNIE E. CROWLEY ET AL., APPELLANTS.

Appeals from District Court, Fergus County.

Decided March 4, 1918.

PER CURIAM.—Pursuant to respondent's motion, the appeals in this cause are hereby dismissed.

Mr. Wm. M. Blackford, for Appellants.

Mr. I. W. Church and *Mr. Fletcher Maddox*, for Respondent.

No. 4,199.—STATE EX REL. WALTER L. WISE, RELATOR, v.
DISTRICT COURT ET AL., RESPONDENTS.

Original application for writ of supervisory control against the District Court of Silver Bow County, and J. J. Lynch, a Judge thereof.

Decided March 7, 1918.

PER CURIAM.—The application of relator for a writ of supervisory control is this day denied.

Messrs. Canning & Geagan, for Relator.

No. 3,905.—F. J. HARRINGTON, ADMINISTRATOR, RESPONDENT,
v. BUTTE & GREAT FALLS MINING CO., APPELLANT.

Appeal from District Court, Silver Bow County; Jno. B. McClernan, Judge.

Decided April 24, 1918.

PER CURIAM.—Pursuant to appellant's *præcipe* for dismissal filed herein, the appeal is dismissed.

Messrs. Kremer, Sanders & Kremer, for Appellant.

Mr. M. C. Cohen, for Respondent.

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In Rem—Summons—Constructive Service.

1. Constructive service is effectual only in actions strictly *in rem*, in actions affecting plaintiff's personal status, and in actions to recover on money demands where and to the extent that some lien brings property into court as a *res* to answer for the judgment which may be entered.—English v. Jenks, 295.

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APPEAL AND ERROR.

Curing error in excluding evidence,—see Evidence, 19.

Ground of Objection not Subject to Change on Appeal.

1. A ruling on the admission of evidence, though erroneous as made, may not be held erroneous on a ground different from that urged in the trial court.—Padden v. Murgittroyd, 1.

New Trial—Waiver.

2. Error in granting a new trial on a petition for letters of administration was waived by failure to appeal from the order.—In re Riley's Estate, 17.

Harmless Error.

3. Only those errors and irregularities committed during trial which do not affect the substantial rights of the parties may, under section 6593, Revised Codes, be disregarded on appeal.—*Olcott v. Gebo*, 35.

Same.

4. The clause in section 7118, Revised Codes, forbidding reversals of judgments for harmless error, has application only to cases in which the respondent makes cross-assignments upon errors on rulings adverse to him and preserved in a bill of exceptions, in order to enable the appellate court to determine whether those complained of by the appellants were compensated or rendered harmless by reason of them.—*Olcott v. Gebo*, 35.

Judgment—Order—Appeal—Dismissal.

5. An appeal from a final judgment not taken within one year after entry will be dismissed, as will also an appeal from an order made after final judgment, if not taken within sixty days after it is made and entered in the minutes.—*Jarrett v. Hart*, 50.

Personal Injuries—Evidence—Sufficiency—Review.

6. If there is sufficient evidence, if credited, to sustain plaintiff's case, the supreme court will not disturb the verdict of the jury, even though the evidence, when judged from the printed record, seems to preponderate against their finding.—*Anderson v. Missoula St. Ry. Co.*, 83.

Record on Appeal—Contents—Service.

7. On an appeal taken under the provisions of Chapter 149, Laws of 1915, the transcript must, under section 2, contain the evidence "requisite for the purposes of the appeal," which transcript appellant is required, under the rules of the supreme court, to serve on the respondent. (See Opinion on Motion for Rehearing.)—*Roberts v. Sinnott*, 114.

Same—Evidence—Error in Admission or Exclusion.

8. Assignments of error relating to the admission and exclusion of evidence cannot, under the above Act, be considered where the evidence "requisite" for their consideration is not presented in the transcript on appeal. (See Opinion on Motion for Rehearing.)—*Roberts v. Sinnott*, 114.

Same—Refusal of Instruction.

9. An assignment of error based on the refusal of an instruction may not be considered on appeal where the instruction is not identified or presented in the manner commanded by section 6746, Revised Codes. *Roberts v. Sinnott*, 114.

Same—Denial of New Trial.

10. An assignment of error relating to an order denying appellant a new trial cannot be sustained where no error is made apparent in the judgment-roll, and in the absence of the evidence from the transcript. (Section 2, Chapter 149, *supra*.) (See Opinion on Motion for Rehearing.)—*Roberts v. Sinnott*, 114.

Defective Record on Appeal—Correction on Terms.

11. *Held*, that the rule that unless the record on appeal conforms to the requirements of the statute the supreme court has no jurisdiction to entertain the appeal, is abrogated by Chapter 149, Laws of 1915; *held*, further, that any defect or insufficiency, short of a total disregard of the law, is now subject to correction upon terms suitable to the offense. *Roberts v. Sinnott*, 114.

Record on Appeal from Judgment.

12. If, under the above Chapter, the appeal is from a judgment and raises only errors of law appearing on the face of the judgment-roll,

the appellant may rest upon the judgment-roll submitted as his transcript; but his adversary may bring up the stenographer's report of the trial to show that, notwithstanding appearances, the assigned errors were in reality of no substantial consequence.—*Roberts v. Sinnott*, 114.

Record on Appeal from New Trial Order.

13. If, under the Act *supra*, the appeal is from an order refusing a new trial, urging errors of law occurring at the trial, the appellant will propose for his transcript not only the judgment-roll and his settled bill of exceptions, if there be one, but also any other proceedings, including such parts of the stenographic record as he thinks proper or necessary, and his adversary must propose, and have incorporated in the transcript, such additional matters as he thinks necessary to show that the supposed errors were cured, corrected or inconsequential.—*Roberts v. Sinnott*, 114.

Record on Appeal—Insufficiency of Evidence.

14. If the appeal under such statute seeks to present the insufficiency of the evidence, it will be necessary to incorporate all the evidence in the transcript on appeal.—*Roberts v. Sinnott*, 114.

Same—Practice—Exhibits.

15. If, on such appeal, a question arises touching the accuracy of any paper or document set out in the transcript, the original, if not a part of the judgment-roll, may be brought up by either party, or, if a part of the judgment-roll, by the supreme court; and when there is a doubt in the mind of the court as to whether the transcript is accurate or ample, or whether any error was substantial or has been compensated, the court may resort to the stenographic record, if brought up, to set that doubt at rest.—*Roberts v. Sinnott*, 114.

Same—Refusal of Instruction—Identification.

16. *Held*, that Chapter 135, Laws of 1915, providing what shall be deemed excepted to, was not designed to modify the provision of section 6746, subdivision 5, so as to do away with the necessity of identifying or authenticating in the transcript on appeal an instruction which was refused.—*Roberts v. Sinnott*, 114.

Right of Appeal—Estoppel.

17. Where a party has recourse to a judgment as an active instrument for his benefit, he may not thereafter prosecute an appeal from it.—*Richli v. Missoula T. & S. Bank*, 127.

Appeal—Correct Conclusion—Wrong Reason.

18. If the conclusion of the trial court was correct, it is immaterial what reason was assigned for it.—*Minneapolis Steel & Machinery Co. v. Thomas*, 132; *Leggat v. City of Butte*, 137.

Presumptions—Duty of Appellant.

19. In entering upon the consideration of an appeal, the supreme court indulges the presumption that the conclusion reached by the trial court is justified, the burden of showing that under no view of the facts disclosed will they support the judgment appealed from being on appellant.—*Dover Lumber Co. v. Whitcomb*, 141.

Nonsuit—Correct Result—Wrong Reason.

20. Where a nonsuit was properly granted, though upon an erroneous reason, the action of the trial court will nevertheless be affirmed.—*Barry v. Badger*, 224.

Eminent Domain—Railroads—Award of Commissioners—Extent of Right of Appeal.

21. Assuming (but not deciding) that section 7344, Revised Codes, confers the right of appeal in a condemnation proceeding upon plaintiff railroad as well as upon the land owner, the appeal must be taken from the entire award of the commissioners appointed to ascertain and determine the compensation to be paid to the owner, and cannot be prose-

cuted from any particular portion thereof with which the appellant may be dissatisfied.—*Great Northern Ry. Co. v. Fiske*, 231.

Instructions—Evidence—Harmless Error.

22. The admission of immaterial evidence and the giving of inapplicable instructions, none of which reflected upon the issues up for trial, were harmless.—*Dewell v. Northern Pac. Ry. Co.*, 350.

Record—Review.

23. On appeal, the supreme court is bound by the record as it is presented and cannot consider matters and things not appearing therein. *Heavey v. Laden*, 421.

Same—New Trial Order—Conflicting Evidence—Affirmance.

24. Where the evidence is in sharp conflict and the order granting a new trial is general in terms, the supreme court will not interfere on appeal.—*Heavey v. Laden*, 421.

Court Bound by Record.

25. On appeal, the supreme court is bound by the record and may not decide the case presented upon statements in appellant's brief not borne out by the record.—*Thrift v. Thrift*, 463.

Hearsay Testimony—When Harmless Error.

26. Where defendants alleged in their counterclaim in an action on a contract, and admitted on the stand, that they were copartners, admission of hearsay testimony to the same effect was harmless.—*Chealey v. Purdy*, 489.

Evidence—Admission—Harmless Error.

27. Technical error in the admission of evidence will not work a reversal of the judgment if appellant is unable to show that by its admission he was prejudiced.—*Farr v. Stein*, 529.

Directed Verdict—Question Determinable on Appeal.

28. Where a judgment is based on a directed verdict, the question on appeal is, not whether the inferences necessary to maintain the court's action are permissible from the evidence, but whether they are commanded by it.—*St. Paul Machinery Mfg. Co. v. Bruce*, 549.

Briefs—New Trial Order—Affirmance, When.

29. An order denying a new trial will be affirmed where there is neither brief nor argument challenging the justice or accuracy of the verdict, nor any reason suggested why the motion should have been granted.—*Great Falls Townsite Co. v. Kowell*, 582.

Judgment—Immaterial Modification—Right of Appellant to Complain.

30. Where plaintiff corporation in an action in ejectment was decreed to be without right or title and, by failure to assail it, in effect confessed that it was not injured by the scope of the judgment, it was not in position on appeal to ask for a modification of it.—*Great Falls Townsite Co. v. Kowell*, 582.

Evidence—Erroneous Exclusion—Curing Error.

31. Error in sustaining an objection to testimony is cured by later permitting the witness to answer the same question.—*Roberts v. Oechsli*, 589.

APPROPRIATIONS.

See Constitution, 7, 13–16.

ASSIGNMENT.

Of state's claim against bank—Waiver,—see *Banks and Banking*, 2.

Public Lands—Entry not Assignable.

1. A desert land entry is not assignable to or for the benefit of a corporation or association, under the Act of Congress of March 28, 1908. (Chap. 112, sec. 2, 35 Stat. 52.)—*Stockmen's Nat. Bank v. Hofeldt*, 205.

ASSUMPSIT.

See Conversion, 2.

ATTACHMENT.

Nature of Remedy.

1. Attachment is a provisional remedy, ancillary to the civil action in which it is issued.—American Surety Company v. Kartowitz, 92.

Time of Issuance.

2. The writ of attachment may issue at the time of issuing summons, or thereafter, but not before.—American Surety Company v. Kartowitz, 92.

Prerequisites to Issuance.

3. The necessary requisites for an attachment are the pendency of an action on a contract, express or implied, for the direct payment of money, and an outstanding valid summons issued in such action.—American Surety Company v. Kartowitz, 92.

Dissolution—Effect of Sustaining Demurrer to Complaint.

4. Where the time within which plaintiff had been granted leave to amend his complaint held insufficient on general demurrer, had not expired, and it was not apparent that the pleading could not be so amended as to properly state the same cause of action ineffectively attempted to be stated in the first instance, motion to discharge an attachment issued at the time the action was commenced, *held* properly denied.—American Surety Company v. Kartowitz, 92.

Public Lands.

5. An attachment does not lie against the inchoate right an entryman of desert land has therein before issuance of patent.—Stockmen's National Bank v. H. Jdt, 205.

ATTORNEY GENERAL.

Nuisances—Abatement—Powers.

1. *Held*, that the authority of the attorney general conferred by the Constitution, the statutes and the common law, to institute and prosecute in the name of the state proceedings to abate, as nuisances, buildings used as common brothels or bawdy-houses, was not abridged by the provision of Chapter 95, Laws of 1917, under which the county attorney must, or any citizen of the county may, maintain a like action, the purpose of such provision being to supplement, not to supersede, existing statutes.—State ex rel. Ford v. Young, 401.

Common-law Duties.

2. The office of the attorney general as it existed in England under the common law was adopted as a part of the governmental machinery of this state, and in the absence of express restrictions, the common-law duties of that officer attach themselves to the office so far as they are applicable and in harmony with our system of government.—State ex rel. Ford v. Young, 401.

ATTORNEYS.

Allowance of fees,—see Probate Proceedings, 2-4.

Fee—Action against railroad—Killing livestock,—see Railroads, 1.

Putting leading questions—When denial of fair trial,—see Criminal Law, 10.

Stipulations—Binding on parties,—see Certiorari, 1; Evidence, 18.

Attorney's Lien—Foreclosure—Action for Money Judgment.

1. An attorney may have and state a cause of action for a money judgment against his client on account of services rendered and money advanced, notwithstanding his purpose is to foreclose an attorney's lien, the existence of which is open to doubt or denial.—*English v. Jenks*, 295.

Same—Waiver—What Does not Constitute.

2. Under Revised Codes, section 6422, an attorney's lien extends to the proceeds of the judgment, "in whosoever hands they may come"; so that the mere fact that the judgment debtor's property was bought in under execution by plaintiff, and thus became the proceeds of the judgment obtained by him for his client, and took the place thereof, did not constitute a waiver of his lien.—*English v. Jenks*, 295.

Same—Action in *Rem*—Default Judgment—Constructive Service—Jurisdiction.

3. In a suit to foreclose an attorney's lien, the record on appeal from a judgment in his favor obtained by default on constructive service of summons was silent as to the whereabouts, at the time the suit was brought, of the *res* (a dredge) to which the judgment was directed. *Held*, that the trial court was without jurisdiction to render the judgment.—*English v. Jenks*, 295.

Conviction of Felony—Disbarment.

4. The name of an attorney convicted of a felony, will, under section 6410, Revised Codes, be stricken from the roll of attorneys, without formal charge or notice to him, upon lodgment of a certified copy of the record of conviction, after the judgment has become final either by reason of failure to appeal or for some other cause.—*In re Thresher*, 474.

Practicing Law—What Constitutes.

5. One who appears as an attorney of record in a cause pending in the district court, files papers in behalf of a party thereto, advertises himself as an attorney in newspapers, on letter-heads used by him in his correspondence, or by a sign displayed in front of his office, practices law in a court of record and is guilty of contempt of the supreme court if he does so without being first duly admitted to practice law in the state.—*In re White*, 476.

Same—Limit of Power of District Judges.

6. A district judge is without authority to grant anyone the privilege of appearing in his court to represent a client, unless such person is duly admitted to practice law in the state or he is a non-resident and has been admitted in the highest court of the state in which he resides, and in the latter case only for the purpose of conducting a particular cause, and upon motion of a member of the bar of Montana, and not to practice generally for any length of time.—*In re White*, 476.

Practicing Without License—What not Defense.

7. Since a district judge has no authority to permit one to practice law without having been admitted to the bar, such person cannot justify his violation of the law in this regard by alleging such permission as his excuse.—*In re White*, 476.

Employment by Both Parties to Action—Disbarment.

8. An attorney who, after consulting with a party to a prospective suit relative to the facts and obtaining a sum of money from him to cover court costs and expenses, accepted employment from the adversary of such party, was by him paid a retainer fee and afterward additional compensation, appeared as attorney of record and assisted in the trial of the cause, returning the money paid by the first party

only after complaint had been made to a district judge and some two years after receipt thereof, is guilty of such unprofessional conduct as compels disbarment.—In re Waddell, 597.

Deceit—Disbarment.

9. An attorney who violated instructions given him by a client relative to the settlement of a claim to the detriment of the client, did not promptly report the settlement when made or remit the amount due the client, and three months and a half after settlement had been made wrote the client that he expected to make settlement in from four to six weeks, merits disbarment.—In re Waddell, 597.

AUTOMOBILES.

Injuries by,—see Personal Injuries, 29–31.

Warranty,—see Negotiable Instruments, 1.

BAIL.

Summarily entering judgment against sureties on bond,—see Jurisdiction, 6.

BANKS AND BANKING.

See, also, Negotiable Instruments, 5–15.

State—Insolvent Banks—Deposit—Suretyship—Subrogation.

1. Where deposits of state funds are secured by a bond and the surety is compelled to pay the amount thereof upon failure of the bank, the right of the state, if existent and not lost in some way, passes by subrogation to the surety.—Aetna Accident & Liability Co. v. Miller, 377.

Same—Prerogative Rights—Waiver.

2. No right of the state can be waived by any power short of that of the state; therefore the prerogative right of the state to a preference was not defeated by an assignment of its claim to the surety, through the instrumentality of a ministerial officer.—Aetna Accident & Liability Co. v. Miller, 377.

Same—Preferences—Right Effective When.

3. The right of preference is effective only while the debtor retains title to the property out of which payment is sought to be made.—Aetna Accident & Liability Co. v. Miller, 377.

Same—Receivership—Preferences.

4. A receivership does not divest the title of the owner; hence the appointment of a receiver of a bank did not result in such a divestiture of title as to destroy the state's right of preference as against general creditors.—Aetna Accident & Liability Co. v. Miller, 377.

Same—Preferences—Common Law.

5. *Held*, under the common law, in the absence of statutory or constitutional provision on the subject, that the state is entitled to a preference, as a prerogative right, over the unsecured creditors of an insolvent bank in which it has funds on deposit.—Aetna Accident & Liability Co. v. Miller, 377.

Insolvent Banks—Agency—Trust Funds—Recovery Back—Identification.

6. The owner of property (including money) intrusted to one who occupies a fiduciary relation to him, as, for instance his agent, may follow and retake it from the agent or anyone in privity with him who is not a *bona fide* holder for value, whether it remains in its original form or in a different or substituted form, provided it can be identified as the same property or the product or proceeds of it; and if the property be money, it is immaterial that it has been

mingled with private moneys of the agent, or his privy, who has knowledge of the source from which it has been obtained.—State ex rel. Kelly v. Farmers' State Bank, 515.

Same—Creditors—Who are not.

7. The owners of a certificate of deposit sent by them to a bank with instructions to collect the amount of it and upon collection to place it to their credit did not become its creditors either by the unauthorized act of the bank in placing the amount thereof to their credit without collection having been made, or by its omission to charge the account after failure to collect, so as to wipe out the apparent credit.—State ex rel. Kelly v. Farmers' State Bank, 515.

Same—Collection of Commercial Paper.

8. A bank to which a certificate of deposit has been sent with instructions to collect, and, if successful, to place the amount of it to the credit of the owners, sustained the relation of agent to them, with authority to change that relation to that of debtor on the condition that collection should be made; failure to collect made the bank a bailee of the owners, with no other authority than to return the certificate to them.—State ex rel. Kelly v. Farmers' State Bank, 515.

Same—Banks—When Guilty of Conversion.

9. A bank which without authority discounted a certificate of deposit left for collection was guilty of a willful conversion of it to its own use.—State ex rel. Kelly v. Farmers' State Bank, 515.

Insolvent Banks—Preferred Claims.

10. Since the owners of the certificate of deposit *supra* did not become creditors of the bank, and the bank sustained to them the relation of agent, they could follow and retake the money realized by the bank through its wrongful act in discounting it, and a portion of which found its way into the hands of the receiver, to the extent to which they could identify it, and to that amount were entitled to a preference over the general creditors of the insolvent bank.—State ex rel. Kelly v. Farmers' State Bank, 515.

Worthless Checks—Payment.

11. Giving a check which is worthless because drawn upon an insolvent bank does not pay a debt.—United States Bank v. Shupak, 542.

Promissory Notes—Maturity—Date of, How not Determined.

12. Where the makers of a demand note did not keep money on deposit in a bank to meet it, but increased or diminished the deposit as the exigencies of their business permitted or required, they could not select a particular date at which their balance was sufficient to meet it and insist that the note matured at that particular time.—United States Bank v. Shupak, 542.

Same—Banks—Agency.

13. *Held*, that section 5935, Revised Codes, providing that an instrument made payable at a bank is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon, creates the bank the agent of the maker and does not authorize it to receive payment for the holder.—United States Bank v. Shupak, 542.

Same—Collections—Duty of Agent.

14. A bank which undertakes to collect commercial paper for a customer must, in the exercise of common prudence and ordinary care, select as a subagent someone other than the party who is to make payment.—United States Bank v. Shupak, 542.

Same.

15. The above rule (paragraph 14) *held* inapplicable where the bank undertaking to collect on a note was acting for itself and the bank to which it was sent was not expected to pay it, two of its directors being the makers thereof.—United States Bank v. Shupak, 542.

Same—Checks—When Payment—When not.

16. A check not being money but merely an order for money its acceptance by an agent in discharge of an indebtedness is conditional upon its payment, in the absence of an agreement to the contrary.—United States Bank v. Shupak, 542.

Same—Collections—Payment in Money—Duty of Agent.

17. An agent has no implied authority to accept payment in anything but money.—United States Bank v. Shupak, 542.

BILLS AND NOTES.

See Negotiable Instruments.

BONDS.

See, also, Bail.

County bonds—Definition,—see Counties, 1.

BOUNDARIES.

Mistake as to,—see Real Property, 6.

Practical location—Estoppel,—see Real Property, 12.

BRIEFS.

See Appeal and Error, 29.

BURDEN OF PROOF.

Adverse possession for statutory period,—see Real Property, 3.

In action to quiet title,—see Real Property, 13.

Insanity,—see Criminal Law, 18, 19.

Statute of limitations—New action,—see Limitations of Actions, 2-4.

CARRIERS.

See, also, Railroads; Street Railways.

Sales—Delivery to Carrier—Reservation of Title in Vendor.

1. The rule that delivery of goods by the seller to a carrier for shipment to the purchaser is, in the absence of circumstances indicating a contrary intention, sufficient evidence of delivery to vest title in the purchaser is not controlling where the seller deviates from the contract in a substantial particular; as where the purchaser has directed them to be consigned to himself, by consigning them to some other person with the request that they be reconsigned to the purchaser.—Old Kentucky Distillery v. Stromberg-Mullins Co., 285.

CATTLE.

See Livestock.

CAVEAT EMPTOR.

When doctrine inapplicable,—see Judicial Sales, 3.

CERTIORARI.

Setting Aside Default—Attorneys—Stipulations—Effect.

1. Where an order setting aside a default was made in open court by stipulation of opposing counsel, the writ of *certiorari* will not issue to annul it.—State ex rel. Wieck v. District Court, 349.

Writ Lies, When.

2. Inasmuch as an appeal does not lie from a judgment summarily entered against the sureties on a bail bond, and there is not any other plain, speedy and adequate remedy, *certiorari* lies to annul it.—State ex rel. Van v. District Court, 577.

CHANGE OF VENUE.

See Venue, 1-3.

CHIROPRACTICE.

See Osteopathy.

CIRCUMSTANTIAL EVIDENCE.

See Criminal Law, 5, 7, 20, 21.

CITIES AND TOWNS.

Licenses—Illegal exaction—Recovery back,—see Licenses, 2.

Special Improvements—Recovery of Assessments Paid—Limitations.

1. If money paid under protest upon a special improvement assessment is a "tax, license or other demand for public revenue" within the meaning of Chapter 135, Laws of 1909, section 1, suit to recover same is barred sixty days after November 30 of the year in which the tax was paid.—Leggat v. City of Butte, 137.

Same—Presentation of Demand.

2. If money paid as above is not a "tax, license or other demand for revenue (Chap. 135, Laws 1909, sec. 1), it forms the basis of a mere demand against the city, not suable until after presentation to and disallowance by the city council.—Leggat v. City of Butte, 137.

Same—Defective Materials—Injunction—Limitations.

3. Assuming (but not deciding) that a special improvement assessment may be enjoined or annulled because of the act of the city council in permitting the use of material not up to specifications, attack based on such ground must be made within thirty days after passage of resolution levying the assessment.—Leggat v. City of Butte, 137.

Special Improvement Districts—Resolution of Intention—Insufficiency.

4. Under Chapter 89, Laws of 1913, before a special improvement district can be created, the city council must pass a resolution of intention to do so, give notice of its passage, *etc.* In an endeavor to create such a district, the council passed a resolution which proclaimed the creation of the district and an intention to assess the property liable for the cost of the improvement. *Held*, that the proceedings were void *in limine* for want of a proper resolution of intention.—Cooper v. City of Bozeman, 277.

Insufficiency of Resolution—How not Cured.

5. Failure to pass a proper resolution of intention to create a special improvement district cannot be corrected by subsequent interpretation at the hands of the council, to the effect that the resolution passed was meant to operate as one of intention.—Cooper v. City of Bozeman, 277.

Statutes—Liberal Construction—When not to be Indulged.

6. Where no work has been done under contracts for the installation of a special improvement, or warrants issued, the claim that a liberal and indulgent view of faulty proceedings in creating the district should be taken has no merit.—*Cooper v. City of Bozeman*, 277.

When Contracts Void.

7. Contracts for the construction of special street improvements let without first giving ten days' notice for bids, and more than nine months after the award, *held* invalid as in contravention of the provisions of Chapter 89, *supra*, touching these subjects.—*Cooper v. City of Bozeman*, 277.

Curative Statutes—When Ineffective.

8. The legislature has not the power to breathe the breath of life into a dead thing; hence defects of the character referred to in paragraph 4, *supra*, in proceedings necessary to confer jurisdiction upon the city council to create a special improvement district, under Chapter 89, Laws of 1913, were not cured by section 9, Chapter 142, Laws of 1915.—*Cooper v. City of Bozeman*, 277.

Same—Railway Right of Way—Assessment—Mode of Payment.

9. An easement in a city street in favor of a railway company for right of way purposes in crossing it is not susceptible of assessment for a special improvement, where the basis adopted for apportioning the cost thereof is front footage; nor is the tract itself assessable under such plan, since under it the lot or parcel of land bordering or abutting on the street on which the improvement was made must bear the cost proportionately, and a street cannot border or abut upon itself.—*Chicago, M. & St. P. Ry. Co. v. Poland*, 497.

Same—Railway Right of Way—Assessment—Sale.

10. A tract in a city street used for a right of way by a railway is not property owned or controlled by the company, but is owned by the public and controlled by the city exclusively, and is therefore not assessable for special improvements or subject to sale for the purpose of paying for the improvement upon failure of the company to pay.—*Chicago, M. & St. P. Ry. Co. v. Poland*, 497.

Police Officers—Removal—Accusation—Sufficiency.

11. An accusation charging a police officer with falsely stating upon his examination for a position on the force that he had never been convicted of a crime; also that he had failed for over three years to file his official bond, that he had purchased a city warrant contrary to statute, that he had publicly associated with a drunken woman and had asked the proprietor of a lodging-house to violate a city ordinance by lodging the woman without requiring her to register, and that from lack of ability, courage, *etc.*, and use of intoxicants he was incompetent to discharge the duties of a police officer, was sufficient to present the question of his fitness to hold the office.—*State ex rel. O'Brien v. Mayor of Butte*, 533.

Same—Charges—Sufficiency—Test.

12. The sufficiency of charges against a police officer under the Metropolitan Police Law cannot be defeated by the fact that the specifications considered as a basis for criminal prosecution may be barred by the statute of limitations.—*State ex rel. O'Brien v. Mayor of Butte*, 533.

Same—Evidence—Sufficiency.

13. The charge that a police officer falsely stated upon his application for a position that he had never been convicted of crime, *held* to have been sustained by evidence that he pleaded guilty of petit larceny and suffered a judgment of fine therefor.—*State ex rel. O'Brien v. Mayor of Butte*, 533.

Same—"Officer"—Purchasing City Warrant.

14. A police captain is an "officer" within the meaning of sections 371 and 8182, Revised Codes, making the purchase of a city warrant by city officers a crime punishable by disqualification from holding office, the fact that the accused bought the warrant for a brother officer being unavailing as a defense.—*State ex rel. O'Brien v. Mayor of Butte*, 533.

CLAIM AND DELIVERY.**Complaint—Sufficiency.**

1. The allegation that at all the times mentioned in the complaint "the plaintiff was, continuously has been, and now is, the owner and entitled to the immediate possession" of the chattel in dispute in an action in claim and delivery, was sufficient to meet the requirement that the pleading must show that plaintiff was its owner and entitled to its possession at the time the action was commenced.—*Olcott v. Gebo*, 35.

Verdict—Insufficiency.

2. Failure of the verdict in an action in claim and delivery to find that defendant wrongfully took and detained the property in question renders it insufficient to sustain a judgment in plaintiff's favor and amounts to a mistrial.—*Olcott v. Gebo*, 35.

Logs and Logging—Constructive Delivery—Passing of Title.

3. In an action in claim and delivery by the purchaser of sawlogs against an attaching creditor of the seller of the logs, where the contract of sale provided, among other things, that the logs should be bark-marked as well as end-marked with the purchaser's mark, and thereafter scaled by its agent part payment to be made for logs at a certain creek landing, "balance to be paid when logs are delivered in the Clark's Fork River," provided that "if logs are not delivered in 1913, \$1.00 per M. shall be deducted from contract price," *held* that title to the logs passed to the buyer when it and the seller intended that it should pass, to-wit, when the logs were marked, scaled and removed to the creek landing, and not when they were delivered in the Clark's Fork River, payment of the last installment of the purchase price not being essential to the passing of title.—*Dover Lumber Co. v. Whitcomb*, 141.

Delivery to Carrier—Reservation of Title in Vendor.

4. The rule that delivery of goods by the seller to a carrier for shipment to the purchaser is, in the absence of circumstances indicating a contrary intention, sufficient evidence of delivery to vest title in the purchaser is not controlling where the seller deviates from the contract in a substantial particular; as where the purchaser has directed them to be consigned to himself, by consigning them to some other person with the request that they be reconsigned to the purchaser.—*Old Kentucky Distillery v. Stromberg-Mullins Co.*, 285.

Demand—Tender—When Unnecessary.

5. Where defendant in a claim and delivery action asserted the right to hold goods shipped to it with a request by the seller that it reconsign them to the purchaser, and thus to force the latter to pay a debt—assuming title in the purchaser and controverting that of plaintiff on the merits—demand for possession and tender were unnecessary, since the law does not require a useless thing.—*Old Kentucky Distillery v. Stromberg-Mullins Co.*, 285.

Detention of Property—Measure of Damages—"Usable Value."

6. In a claim and delivery action the measure of damages for the wrongful detention of property having a usable value, as distinguished from its value for sale or consumption, is the reasonable value of its use from the date of seizure to the time of trial, provided there is

no allegation of special damages and the party claiming damages had the right to use the property, was in a situation to use it and could have done so but for the wrongful acts of defendant.—Hammond v. Thompson, 609.

Damages—Evidence—Insufficiency.

7. Evidence *held* insufficient to justify an award of damages for more than nominal damages for the wrongful detention of hotel and saloon furnishings.—Hammond v. Thompson, 609.

CLERK OF DISTRICT COURT.

Criminal Law—Verdict—Filing-mark—Effect.

1. The act of the clerk in marking an insufficient verdict as “filed” was a mere irregularity, which could not affect the substantial rights of the defendant or prevent the jury from further deliberating of their verdict or returning a proper one.—State v. Sieff, 165.

COAL MINES.

Taxation,—see Taxation, 1–6.

COMMISSIONS.

Del credere commissions,—see Principal and Agent, 1.

COMMON LAW.

Marriage,—see Probate Proceedings, 1.

What Constitutes.

1. “Common law” means the common law of England as applied and modified by the courts of this country up to the time it became the rule of decision in this state.—Aetna Accident & Liability Co. v. Miller, 377.

Common-law Actions—Rule.

2. Common-law actions cannot be maintained in this state, where provision is made by the Code prescribing the remedy.—Tetrault v. Ingraham, 524.

CONDEMNATION PROCEEDINGS.

See Eminent Domain.

CONSTITUTION.

Taxation—Invalidity of lack of uniformity,—see Counties, 2.

Class legislation,—see Osteopathy, 2.

Statutes—Defective title,—see, also, Osteopathy, 1.

Contemporaneous Construction—Effect.

1. Contemporaneous construction by the legislature of a constitutional provision raises a strong presumption that such construction, if uniform and long acquiesced in by the people and applied by the officers intrusted with its execution, rightly interprets the provision; and while such construction is not conclusive, it is entitled to most respectful consideration.—Wells, Fargo & Co. v. Harrington, 235.

Railroads—Killing Livestock — Attorney’s Fee — Statute — Unconstitutionality.

2. *Held*, that section 4313, Revised Codes, allowing an attorney’s fee as part of the costs of plaintiff, in case he is successful, in an action against a railroad company for cattle injured or killed on its tracks,

but not allowing it to the company if he is not, is a denial of the equal protection of the laws, and therefore unconstitutional.—*Dewell v. Northern Pacific Ry. Co.*, 350.

Same—Statutes—Delegating Legislative Powers.

3. Section 4312, Revised Codes, which provides that a railroad company shall be liable to the owner of cattle killed or injured on its tracks for failure to keep the record book prescribed in section 4311, and that the court or jury “may in its or their discretion render verdict and judgment for the amount of the value of such animals,” *etc.*, is not unconstitutional as delegating law-making powers to the court or jury, *i. e.*, to determine whether the statute shall be effective as a law of the state or not.—*Dewell v. Northern Pacific Ry. Co.*, 350.

Statutes—Constitutionality—Duty of Courts.

4. Where a statute is assailed as unconstitutional, the question is not whether it is possible to condemn but whether it is possible to uphold; hence it will not be declared unconstitutional unless its nullity is placed beyond reasonable doubt.—*State ex rel. Cryderman v. Wienrich*, 390.

Seed Grain Law—Taxation—Public Purpose.

5. *Held*, that the seed grain law (Chap. 13, Laws 1915), designed to furnish aid to persons engaged in agriculture who, because so reduced in circumstances by natural or other conditions beyond their control, that they have no means wherewith to purchase seed, is not in contravention of section 11, Article XII, forbidding taxation for other than public purposes.—*State ex rel. Cryderman v. Wienrich*, 390.

Same—Counties—Loaning Credit.

6. Construing section 1, Article XIII, Constitution, forbidding counties from giving or loaning their credit in aid of, or making any donation to, an individual, with section 5, Article X, making it the duty of the counties to provide for those inhabitants who by reason of misfortune may have claims upon the aid of society, the seed grain law does not offend against section 1.—*State ex rel. Cryderman v. Wienrich*, 390.

Same—Appropriation—Public Funds.

7. Section 35, Article V, prohibiting appropriations by the legislature for benevolent purposes, does not affect Chapter 13, *supra*, since the legislature made no appropriation for the purposes sought to be served by the Act.—*State ex rel. Cryderman v. Wienrich*, 390.

Same—Counties—Incurring Indebtedness—Special Election.

8. Chapter 13, Laws of 1915, *held* inoperative in any case in which the indebtedness sought to be created by a county bond issue is in excess of \$10,000, upon a mere petition, section 5, Article XIII, of the Constitution prohibiting the incurring of indebtedness beyond the sum of \$10,000 without the approval of the qualified electors, and no provision for such an election having been made.—*State ex rel. Cryderman v. Wienrich*, 390.

School Lands—Sale—“Town”—Definition.

9. *Held*, that “town” within the meaning of section 1, Article XVII, of the state Constitution, prohibiting sales of school lands within three miles of the limits of a town, is an aggregation of inhabitants and houses used for various purposes so close to one another that the inhabitants may be said to dwell together, upon a regularly platted town site, whether incorporated or not.—*Davis v. Stewart*, 429.

Same—Town—Three-mile Limit—How Measured.

10. *Held*, that the three-mile distance from the limits of towns within which school lands cannot be sold under the inhibition of section 1, Article XVII, of the Constitution, must be measured from the nearest point upon the town-site plat.—*Davis v. Stewart*, 429.

Character of Instrument.

11. The provisions of the Constitution cannot be suspended, without its authority, for any reason, and are therefore as binding in time of war as in time of peace.—State ex rel. Campbell v. Stewart, 504.

War Defense Act—Title—Sufficiency.

12. *Held*, that the War Defense Act (Chap. 21, Ex. Sess. 1918) has to do with but one subject, which is clearly expressed in its title, viz.: "to assist the United States in carrying on and prosecuting the war now existing between the United States and the German and Austrian empires," and therefore does not contravene the provisions of section 23, Article V of the Constitution.—State ex rel. Campbell v. Stewart, 504.

Same—Appropriations—Separate Bill.

13. The Act *supra* is not subject to the constitutional objection that, while it appropriates money such appropriation is not made by a separate bill embracing one subject, as required by section 33, Article V of the Constitution.—State ex rel. Campbell v. Stewart, 504.

Same—Appropriations—Charitable Purposes.

14. The Act above is not objectionable as appropriating money for charitable, industrial or benevolent purposes "to any person, corporation or community not under the absolute control of the state," within the meaning of section 35, Article V, of the Constitution.—State ex rel. Campbell v. Stewart, 504.

Same—Gifts—Donations—Lending State's Credit.

15. The Act is not repugnant to section 1, Article XIII, of the Constitution, forbidding the state from making loans, giving credit or making gifts or donations to persons, corporations or associations.—State ex rel. Campbell v. Stewart, 504.

Same—Appropriations—Defense of Nation.

16. The purpose of Chapter 21, Ex. Sess. Laws, 1918, being to assist in the defense of the United States, the appropriation made therein falls within the exception found in section 12, Article XII, of the Constitution, under which the legislature may properly make an appropriation without a fund behind it, and without provision having first been made for levying a tax to furnish such fund, it in these circumstances having the power to authorize any proper public agency to procure the necessary funds by borrowing, *i. e.*, the sale of bonds.—State ex rel. Campbell v. Stewart, 504.

Same—"Debt"—Act Does not Create.

17. The Act does not create a "debt" within the meaning of section 2, Article XIII, of the Constitution, forbidding the creation of a debt without providing by irrepealable law for the levy of a tax until the indebtedness therein provided shall have been fully paid or discharged.—State ex rel. Campbell v. Stewart, 504.

CONSTITUTION OF MONTANA.

(List of Sections Cited or Commented upon.)

Article	III, section	11	179
	III, section	14	312
	V, section	23	56, 508
	V, section	33	508
	V, section	35	394, 508
	VII, section	1	403
	VIII, section	11	403
	X, section	5	397
	XII, sections	1, 7, 16, 17	238

XII, sections 2, 3, 17.....102 *et seq.*
XII, section .8 307
XII, section 11 307
XII, section 12508 *et seq.*
XII, section 18 241
XIII, section 1394, 508
XIII, section 2 508
XIII, section 5 305
XVII, sections 1, 2430 *et seq.*

CONTEMPT.

Secreting witness of adversary,—see Witnesses, 1.

Evidence—Insufficiency—Supervisory Control.

1. Relatrix was *ex parte*, upon the allegation of the complaint filed under the provisions of Chapter 95, Laws of 1917, enjoined *pendente lite* from suffering or permitting the use of a saloon and dance-hall by females. Though the question whether she was the owner or manager of the place was thus left undecided at the time she was tried for a violation of the order, she was found guilty of contempt. *Held*, on application for writ of supervisory control, that in the absence of evidence showing relatrix to have been in control of the place, she could not possibly have violated the order in permitting something to be done on the premises, and therefore order annulled. State *ex rel.* Brashear v. District Court, 580.

CONTRACTS.

Actions on—Venue,—see Venue, 1–3.

Disaffirmance, by infants,—see Infants, 1–4.

Failure of consideration—Breach of warranty,—see Sales, 1.

Offer and acceptance,—see Counties, 4.

Offer and Acceptance.

1. To complete a contract, the offer must be accepted in the same terms in which made.—Flynn v. Beaverhead County, 309.

Uncertainty—Invalidity.

2. In an action by a lessor to recover his share of grain alleged to have been raised by the defendant under a contract of lease of agricultural land, the only definite portion of which was that which secured to defendant (without naming a consideration) the possession of the land for a specified time but which did not bind him to do anything or raise any grain, the contract *held* void for uncertainty under section 4999, Revised Codes.—Schwab v. McVey, 422.

CONVERSION.

See, also, Banks and Banking, 9.

Of Mortgaged Property—Complaint—Insufficiency.

1. The complaint in an action in conversion of property upon which plaintiff held a chattel mortgage, which did not allege that she held the note to secure which the mortgage was given, that the note had not been paid, and that she had some property interest in the property converted, did not state a cause of action.—Young v. Bray, 415.

Same—Waiver of Tort—*Assumpsit*.

2. One whose property has been wrongfully converted may waive the tort and sue in *assumpsit*, in which event the measure of damages is the value of the property at the date of the conversion, not

to exceed the amount due plaintiff; hence the complaint must allege such value.—*Young v. Bray*, 415.

Same—Promissory Notes—Complaint—Insufficiency.

3. The complaint above adverted to was further insufficient for failure to allege that plaintiff was the holder of the note at the time action was commenced.—*Young v. Bray*, 415.

CORPORATIONS.

Franchise—Taxation,—see Taxation, 7.

Liability of directors for failure to file annual report,—see County Clerks, 1-4.

Foreign Corporations—“Doing Business”—Definition.

1. Making a single contract or purchase does not constitute “doing business,” within the meaning of sections 4413 and 4415, Revised Codes, which provide that contracts made by foreign corporations without having first, before doing business within this state, filed its articles of incorporation, *etc.*, in certain offices, shall be unenforceable.—*Dover Lumber Co. v. Whitcomb*, 141.

COSTS.

Refusal to Allow—When Error.

1. Refusal to allow an item of costs for sheriff’s fees and mileage, on the ground that the items were not set forth with sufficient particularity, was error.—*Dewell v. Northern Pac. Ry. Co.*, 350.

Jury—View of Premises.

2. The expense of taking the jury to view the premises is not taxable as costs under Revised Codes, section 7169, in the absence of a custom or rule of court authorizing it.—*Dewell v. Northern Pac. Ry. Co.*, 350.

Cost Bill—*Prima Facie* Correct.

3. The cost bill makes out a *prima facie* case in favor of the items therein contained, the burden of overcoming it being upon the unsuccessful party.—*Dewell v. Northern Pac. Ry. Co.*, 350.

COUNTERCLAIMS.

Nature of pleading,—see Pleading and Practice, 20.

Unjustifiable Verdict.

1. Where, in an action on a promissory note, the total of defendant’s counterclaims could not be made to equal the amount admittedly due plaintiff, a verdict in favor of the former was unjustifiable. *Murray v. Haldorn*, 125.

COUNTIES.

Indebtedness—Seed Grain Act,—see Constitution, 5-8.

County Bond—What Constitutes.

1. A county bond is one issued by the county to the payment of which the full faith and credit of the entire county are pledged; hence one which imposes an obligation upon a district less than an entire county is not a county bond.—*Hamilton v. Board of County Commissioners*, 301.

Taxation—Uniformity—County High Schools—Statutes—Constitution.

2. *Held*, that bonds authorized for county high school purposes by Chapter 167, Laws of 1917, are county bonds as defined above, and that therefore the provision of section 2109 thereof making taxable,

for interest and redemption purposes, only property in the county outside the limits of those districts in which a district high school is maintained, is void under section 11, Article XII, of the Constitution.—*Hamilton v. Board of County Commissioners*, 301.

Roads—Compensation—Limitations of Actions.

3. *Held*, that the subject matter of an action against a county by which it was sought to obtain compensation for land taken for road purposes under an agreement the consideration for which failed was not a "claim" against the county, within the meaning of either section 2945, Revised Codes, an action on which is barred if not brought within one year after its accrual, or section 6450a, which requires action within six months after rejection thereof.—*Flynn v. Beaverhead County*, 309.

Same—Petition—Offer and Acceptance—Contract.

4. The petition for the establishment of a county road signed by plaintiff, and his agreement in writing specifying the terms and conditions upon which he would grant a right of way over his land, were one instrument and constituted his offer, which, when accepted by the county, completed the agreement.—*Flynn v. Beaverhead County*, 309.

COUNTY ATTORNEY.

Leading questions—When denial of fair trial,—see *Criminal Law*, 10.

Repeating improper questions—When misconduct,—see *Criminal Law*, 12.

COUNTY CLERKS.

"Filing" Instruments—Fees—Prepayment.

1. Where a paper entitled to be filed is deposited with the proper custodian and, if prepayment of the filing fee is required, the fee tendered, it is filed, the marking thereof as "Filed" not constituting the filing.—*Minneapolis Steel & Machinery Co. v. Thomas*, 132.

Same—Fees—Prepayment—Statutes.

2. Under section 3043, Revised Codes, the county clerk may, but is not required to, demand prepayment of filing or other fees; section 3144, having to do with the payment of fees in advance, being inapplicable.—*Minneapolis Steel & Machinery Co. v. Thomas*, 132.

Same—What Does not Constitute a Demand.

3. Where a corporation sent its annual report to the county clerk with the request that he advise it as to his fee for filing, his answer (accompanying his refusal to file it because not acknowledged), "Will state that the fee for filing is \$1," *held* not such a demand for prepayment of the fee as is contemplated by section 3043, Revised Codes.—*Minneapolis Steel & Machinery Co. v. Thomas*, 132.

Corporations—Annual Reports—Failure to File—Evidence—Insufficiency.

4. A corporation mailed its annual report to the county clerk on January 16 but failed to inclose the filing fee of one dollar. The clerk received the report on the 17th or 19th, retained it in his office and mailed the sender a bill for the fee. On January 23 the fee was received and the clerk thereupon indorsed the report as filed on the latter date. The statute (Rev. Codes, sec. 3850, as amended by Laws 1909, Chap. 140) provides that the report must be filed within twenty days from and after December 31. In an action commenced to enforce the directors' individual liability for failure to file the report in time, evidence *held* insufficient to show that the report was not filed in time.—*Minneapolis Steel & Machinery Co. v. Thomas*, 132.

COUNTY COMMISSIONERS.

Removal—Statutes—Amendment—Jurisdiction.

1. After an accusation for collecting illegal fees had been brought against a county commissioner under section 9006, Revised Codes, but before the defendant was brought to trial, the section was amended so as to change not only the procedure but the very basis of the right. Neither Constitution nor statute provides for a general saving clause. *Held*, that in the absence of such clause or a special provision in the amendatory Act saving all proceedings pending under section 9006, the court was without jurisdiction of the subject matter of the accusation either under the old or the new Act.—*State ex rel. Paige v. District Court*, 332.

COUNTY HIGH SCHOOLS.

Bonds—Validity,—see Counties, 1-2.

CRIMINAL LAW.

Forfeiture of bail,—see Jurisdiction, 6.

Indeterminate sentences,—see Habeas Corpus, 1.

Judgments—Fine and imprisonment,—see Judgments, 3, 4.

Information—Negating Exception.

1. An information charging one with practicing osteopathy without first obtaining a license need not allege that he had not procured a temporary certificate permitting him to practice, this being a matter of defense.—*State v. Hopkins*, 52.

Malicious Burning of Property—Information—Proper Amendment.

2. An information charging defendant with the malicious destruction of property, instead of with the malicious burning thereof, which latter is made a felony by section 8748, Revised Codes, was properly permitted to be amended by substituting the word "burning" for the word "destruction," in the absence of a request by defendant for a continuance or a showing that the evidence he was prepared to offer would not be equally applicable to the facts charged in the information as amended.—*State v. Sieff*, 165.

Same—Defective Verdict—Power of Court.

3. Under section 9323, Revised Codes, the jury, after bringing in a verdict of guilty for the malicious destruction of property, was properly directed to retire for further deliberation and return a form of verdict, under the information above, authorized by law.—*State v. Sieff*, 165.

Same—Clerk of District Court—Verdict—Filing-mark—Effect.

4. The act of the clerk in marking an insufficient verdict as "filed" was a mere irregularity, which could not affect the substantial rights of the defendant or prevent the jury from further deliberating of their verdict or returning a proper one.—*State v. Sieff*, 165.

Same—Circumstantial Evidence—Sufficiency—Rule.

5. Circumstantial evidence must point unmistakably to accused's guilt and be irreconcilable with any other rational hypothesis.—*State v. Sieff*, 165.

Same—Conviction—Evidence Required.

6. The guilt of one charged with crime must be established beyond a reasonable doubt; mere suspicions or probabilities are insufficient. *State v. Sief*, 165.

Same—Circumstantial Evidence—Insufficiency.

7. Evidence tending to show that defendant, charged with maliciously burning some hay in the stack on land not far distant from

his own, was absent from his home on the night of the fire, made false statements as to his whereabouts, and gave voice to expressions of ill-will toward the owner thereof, was not alone sufficient to warrant conviction.—*State v. Sief*, 165.

Prostitution — White Slavery — Information — Charging Two Offenses — Waiver.

8. Motion to compel the county attorney to elect as between two offenses charged in an information contrary to section 9151, Revised Codes, was not, but a demurrer was, the proper manner in which to raise the objection; by pleading over and failing to demur, the objection was waived.—*State v. Kanakaris*, 180.

Same—Evidence—Insufficiency.

9. Defendant was charged with receiving some of the earnings of a prostitute in violation of section 8, Chapter 1, Laws of 1911, and with living with, and depending for his living, in whole or in part, upon money supplied by, her (sec. 9); the evidence tended to prove him guilty of the first, but the jury found a verdict of guilty upon the second charge, although there was no evidence to support it. *Held*, that the verdict was not supported by the evidence.—*State v. Kanakaris*, 180.

Trial—Leading Questions—Denial of Fair Trial.

10. The asking of numerous leading questions by the prosecution, over objection of defendant, may justly be cause for complaint that by the course adopted he was denied the fair and impartial trial guaranteed by the Constitution.—*State v. Kanakaris*, 180.

Evidence—Degrading Witness.

11. Questions asked the defendant upon his cross-examination for the purpose of impeaching or degrading him in the estimation of the jury were improper.—*State v. Kanakaris*, 180.

Same—Repetition of Questions—County Attorney—Misconduct.

12. Where an objection to a question is sustained because improper in form, the form may be varied and the question repeated; but where it is sustained because the question seeks to elicit inadmissible evidence, the action of the county attorney in repeating it to three different witnesses, after an objection to it had been sustained when first interposed, was contemptuous, and must have resulted in prejudice to appellant.—*State v. Kanakaris*, 180.

Instructions—Error—Defendant may not Complain, When.

13. Of an error in instructions by which the court imposed upon the state the burden of proving both offenses charged, in order to establish one of them, defendant was not in position to complain.—*State v. Kanakaris*, 180.

Credibility of Witnesses—Improper Instruction.

14. An instruction that the jury could disregard the entire testimony of any witness whom they believed to have deliberately testified falsely to any fact material to the issue, etc., was erroneous under section 8028, Revised Codes, subdivision 3.—*State v. Kanakaris*, 180.

Mayhem—Information—Sufficiency.

15. *Held*, that the right testicle of a male human being is a "member of the body," within the meaning of section 8304, Revised Codes, defining the crime of mayhem.—*State v. Sheldon*, 185.

Same—Insanity—Uncontrollable Impulse—Evidence.

16. Defendant having testified to an uncontrollable impulse to commit the act of mayhem and the causes thereof, one of which was certain information imparted to him by the prosecuting witness touching defendant's family, questions designed to bring out the ac-

curacy of such information were immaterial, the material fact being that he had such information.—State v. Sheldon, 185.

Same—Cross-examination—*Animus* of Expert Witness—Harmless Error.

17. Refusal to require a medical expert to answer questions put to him by defendant's attorney on cross-examination and designed to search his *animus* in testifying, *held* harmless error where several other experts, unchallenged for bias, had testified to the same matters as he had done.—State v. Sheldon, 185.

Same—Insanity—Burden of Proof—Correct Instruction.

18. An instruction that, the law presuming every person to be sane, the burden of presenting the issue and of furnishing evidence sufficient to raise a reasonable doubt upon the subject, is upon the accused person claiming insanity as a defense, was correct.—State v. Sheldon, 185.

Same—Insanity—Burden of Proof—Harmless Error.

19. An instruction relative to the burden of proof on the issue of insanity, which employed the word "guilt" for the word "insanity," *held* harmless, if error, in view of the whole charge submitted to the jury. State v. Sheldon, 185.

Grand Larceny—Livestock—Circumstantial Evidence—Sufficiency.

20. Under the rule that where a conviction is sought upon circumstantial evidence, the criminatory circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis, evidence *held* sufficient to show the theft of certain cattle by defendants.—State v. Woods, 193.

Same—Venue—*Corpus Delicti*—Circumstantial Evidence.

21. In cattle-stealing cases both the *corpus delicti* (the theft) and the venue may be established by circumstantial evidence.—State v. Woods, 193.

Homicide—Evidence—Cross-examination—Harmless Error.

22. Error in refusing to compel a physician to answer a question on cross-examination, after testifying on direct that deceased had come to his death by septicemia due to a gunshot wound, whether he knew that the victim of the homicide was suffering from acute or chronic nephritis, was rendered harmless by the failure of counsel to pursue the inquiry further.—State v. Fisher, 211.

Same—Defendants' Conduct and Declarations—Admissibility.

23. Evidence of defendants' declarations and conduct at the time they were identified by a witness as the men whom he saw running from the scene of the crime was admissible.—State v. Fisher, 211.

Same—Cross-examination—Harmless Error.

24. Though error was committed in refusing a police officer to state on cross-examination whether at the time defendants were identified by decedent at the hospital within a day or two prior to his death he seemed to be under the influence of a drug, the error was insufficient to work a reversal of the judgment where counsel made no effort thereafter to show the condition of decedent at that time.—State v. Fisher, 211.

Same—Instructions—Proper Refusal.

25. Where defendants, charged with homicide, were either guilty of murder in the first degree or innocent, instructions upon murder in the second degree and upon manslaughter were properly refused.—State v. Fisher, 211.

Homicide—Refusal of Evidence—When Harmless Error.

26. Error in excluding a question when first asked a witness was rendered harmless upon his recall when the question was repeated and then fully answered.—State v. Powell, 217.

Same—Reasonable Doubt—Instruction—Proper Refusal.

27. The court having charged the jury in a prosecution for homicide that the state must prove beyond a reasonable doubt every material fact necessary to make out the crime charged, refusal of an instruction of the same rule in a negative form or in one applying it to an isolated fact was not error.—State v. Powell, 217.

Same—Instruction—Inapplicability to Evidence—Proper Refusal.

28. Where, after decedent had withdrawn from a quarrel with defendant, the latter armed himself with a knife and about an hour later stabbed the former while asleep in bed, an instruction that the burden of proving that defendant was the aggressor was inapplicable and properly refused.—State v. Powell, 217.

Same—Defense Made Out by State—Effect.

29. Where the proof of the prosecution—*i. e.*, the effect of all the evidence introduced by it—makes out the defense upon which one charged with crime relies, by raising a reasonable doubt of his guilt, defendant may, under section 9282, Revised Codes, avail himself of such defense without proof on his part.—State v. Powell, 217.

Same—Justification—Improper Instruction.

30. An instruction which would have warranted the conclusion that if the state had offered any single item of evidence tending to show that defendant was justified in killing deceased, his acquittal should follow under his plea of justification, was properly refused. (Rev. Codes, sec. 9282.)—State v. Powell, 217.

Same—Inadequate Instructions—Request for Amplification Necessary.

31. Failure to offer an instruction amplifying one given by the court in the language of a section of the Codes, precludes defendant from complaining of the one given, unless the language used is inherently erroneous.—State v. Powell, 217.

Motion in Arrest.

32. Under section 9353, Revised Codes, a motion in arrest lies only for the defects mentioned in section 9200, appearing on the face of the information, if not waived by failure to demur.—State v. Caterni, 456.

Same—Evidence—Inadmissibility.

33. Resort to evidence extrinsic the information to show that it does not accurately state the facts is not permissible on motion in arrest.—State v. Caterni, 456.

Murder in First Degree—Killing Wrong Person—Effect.

34. Since murder in the first degree is the taking of a human life with a deliberate and premeditated design to kill the person who was killed, a verdict finding defendant guilty of that degree was not warranted by evidence showing that deceased was accidentally killed by a shot fired by defendant but intended for another who was also killed by a second shot but for the killing of whom defendant was not on trial; in such case the crime becomes murder in the second degree or manslaughter. State v. Caterni, 456.

Same—Self-defense—Instruction—When Inapplicable.

35. Under circumstances such as are adverted to in paragraph 34, *supra*, an instruction on the question of self-defense was inapplicable. State v. Caterni, 456.

Same—Evidence—Quarrelsome Disposition of Deceased—*Res Gestae*.

36. Evidence that the person whom defendant intended to kill and subsequently killed was practically running amuck the evening of the homi-

cide, armed with a stiletto, quarreling with and threatening other persons besides defendant, was admissible as part of the *res gestae*, as well as to show who was the aggressor and thus responsible for the killing of the person who lost his life accidentally.—*State v. Caterni*, 456.

CROSS-EXAMINATION.

See Evidence, 1, 7, 10, 14.

DECLARATIONS.

Admissibility,—see Criminal Law, 9.

DECEIT.

Disbarment of attorney,—see Attorneys, 9.

DEEDS.

Breach of warranty,—see Real Property, 1.

Correction deeds—Acceptance—Effect,—see Real Property, 11.

Reservations of minerals in—Taxation,—see Taxation, 1-6.

See, also, Reformation of Instruments; Tax Deeds.

“Good and Sufficient” Deed—What is not.

1. A contract to deliver a good and sufficient deed imports that the vendor will furnish a good title, and is breached where a vendor without title tenders a quitclaim deed sufficient in form.—*Lindeman v. Pinson*, 466.

DEMAND.

Filing fee—What is not,—see County Clerks, 3.

For possession of personal property—When unnecessary,—see Claim and Delivery, 5.

DENIAL.

See General Denial.

DISBARMENT.

See Attorneys, 4, 5, 8, 9.

DISCRETION.

Allowance of interest,—see Interest, 1.

DISMISSAL.

Of appeal from judgment,—see Appeal and Error, 5.

DISTRICT COURTS.

See, also, Judges—Jurisdiction—Probate Proceedings.

Probate Courts—Extent of Jurisdiction.

1. A district court sitting in probate has only such jurisdiction as is specially conferred or necessarily implied.—*State ex rel. Eisenhauer v. District Court*, 172.

Jurisdiction—Power to Enforce.

2. Whenever jurisdiction is conferred upon a court, all the means necessary to carry the same into effect are expressly provided by Revised Codes, section 6329, and if a court has power to make an order

it has jurisdiction to enforce it.—*State ex rel. Eisenhauer v. District Court*, 172.

Misdemeanors—Fines and Imprisonment—Jurisdiction.

3. *Held*, on *habeas corpus*, that the district court has the power, under section 9371, Revised Codes, to impose a sentence of imprisonment in the county jail for a certain number of days, defendant in addition to pay a fine in a stated amount, and, in default of payment, to stand committed one day for every two dollars of the fine after expiration of the term of imprisonment, until the fine is paid.—*In re Londos*, 418.

Same—Fines—Imprisonment—Mode of Collection.

4. *Held*, that that portion of the judgment above providing for a term of imprisonment equal to one day for every two dollars of the fine in case of nonpayment is not a part of the judgment, but represents the common-law mode of executing the sentence, that is, of enforcing the payment of the fine.—*In re Londos*, 418.

Attorneys—Practice of Law—Limit of Power of District Judges.

5. A district judge is without authority to grant anyone the privilege of appearing in his court to represent a client, unless such person is duly admitted to practice law in the state or he is a nonresident and has been admitted in the highest court of the state in which he resides, and in the latter case only for the purpose of conducting a particular cause, and upon motion of a member of the bar of Montana, and not to practice generally for any length of time.—*In re White*, 476.

DIVORCE

See Husband and Wife, 1-4.

EJECTMENT.

See Appeal and Error, 30; Real Property, 2-10.

ELECTION OF REMEDIES.

See Fraud, 1.

EMINENT DOMAIN.

Railroads—Award of Commissioners—Right to Appeal—Extent of Right.

1. Assuming (but not deciding) that section 7344, Revised Codes, confers the right of appeal in a condemnation proceeding upon plaintiff railroad as well as upon the land owner, the appeal must be taken from the entire award of the commissioners appointed to ascertain and determine the compensation to be paid to the owner, and cannot be prosecuted from any particular portion thereof with which the appellant may be dissatisfied.—*Great Northern Ry. Co. v. Fiske*, 231.

EQUITY.

See, also, particular subjects of Equity Jurisdiction.

Courts of Equity—Powers.

1. Courts of equity are not bound by cast-iron rules, but are governed by rules which are flexible and adapt themselves to particular exigencies, so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other.—*Cox v. Hall*, 154.

Judgment Liens—Priority of Equitable Titles.

2. The lien of a judgment is a general one, and must yield to all prior equitable titles in others.—*Stockmen's Nat. Bank v. Hofeldt*, 205.

ESTATES OF DECEASED PERSONS.

See Executors and Administrators; Taxation.

ESTOPPEL.

Practical location of boundaries by parties,—see Real Property, 12.

Right of Appeal—Acquiescence in Decree.

1. Where a party has recourse to a judgment as an active instrument for his benefit, he may not thereafter prosecute an appeal from it.—*Richli v. Missoula I. & S. Bank*, 127.

Water Rights—Right of Appeal—Estoppel by Acquiescence in Decree.

2. *Held*, under the above rule, that plaintiffs in a water right suit estopped themselves from prosecuting an appeal from the decree in the provisions of which they acquiesced during the entire irrigating season following its entry by consenting to the appointment of a water commissioner to apportion the water of the stream in controversy as decreed, by contributing to the payment of his compensation, by prosecuting such officer for contempt, as well as by soliciting the appointment of a new commissioner for the second season following rendition of the decree.—*Richli v. Missouli I. & S. Bank*, 127.

Pleadings—Admissions—Failure to Deny.

3. Defendant, as successor in interest of a purchaser of property at a bankruptcy sale subject to the satisfaction of an attachment lien, by failure to make denial, admitted the amount claimed by the lienor, and was therefore estopped to question an order of sale to satisfy the lien.—*Strong v. Butte, C. & B. C. Corp.*, 584.

EVIDENCE.

Circumstantial,—see Criminal Law, 5, 7.

Ground of objection, not subject to change on appeal,—see Appeal and Error, 1.

Hearsay testimony—Harmless error,—see Appeal and Error, 26.

Intoxication,—see Personal Injuries, 30, 31.

Leading questions—When denial of fair trial,—see Criminal Law, 10.

Questions degrading witness,—see Criminal Law, 11.

Repetition of improper questions—When misconduct,—see Criminal Law, 12.

Criminal Law—Cross-examination—*Animus* of Expert Witness—Harmless Error.

1. Refusal to require a medical expert to answer questions put to him by defendant's attorney on cross-examination and designed to search his *animus* in testifying, *held* harmless error where several other experts, unchallenged for bias, had testified to the same matters as he had done.—*State v. Sheldon*, 185.

Same—Insanity—Uncontrollable Impulse—Evidence.

2. Defendant having testified to an uncontrollable impulse to commit the act of mayhem and the causes thereof, one of which was certain information imparted to him by the prosecuting witness touching defendant's family, questions designed to bring out the accuracy of such information were immaterial, the material fact being that he had such information.—*State v. Sheldon*, 185.

Same—Insanity—Burden of Proof—Correct Instruction.

3. An instruction that, the law presuming every person to be sane, the burden of presenting the issue and of furnishing evidence sufficient to raise a reasonable doubt upon the subject, is upon the accused person claiming insanity as a defense, was correct.—*State v. Sheldon*, 185.

Same—Insanity—Burden of Proof—Harmless Error.

4. An instruction relative to the burden of proof on the issue of insanity, which employed the word "guilt" for the word "insanity," *held* harmless, if error, in view of the whole charge submitted to the jury.—*State v. Sheldon*, 185.

Larceny of Livestock—Circumstantial Evidence—Sufficiency.

5. Under the rule that where a conviction is sought upon circumstantial evidence, the criminatory circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis, evidence *held* sufficient to show the theft of certain cattle by defendants.—*State v. Woods*, 193.

Same—Venue—*Corpus Delicti*—Circumstantial Evidence.

6. In cattle-stealing cases both the *corpus delicti* (the theft) and the venue may be established by circumstantial evidence.—*State v. Woods*, 193.

Homicide—Expert Witness—Cross-examination—Harmless Error.

7. Error in refusing to compel a physician to answer a question on cross-examination, after testifying on direct that deceased had come to his death by septicemia due to a gunshot wound, whether he knew that the victim of the homicide was suffering from acute or chronic nephritis, was rendered harmless by the failure of counsel to pursue the inquiry further.—*State v. Fisher*, 211.

Trial—Evidence—Motion to Strike—When Too Late.

8. Motion to strike testimony admitted without objection comes too late.—*State v. Fisher*, 211.

Homicide—Defendants' Conduct and Declarations—Admissibility.

9. Evidence of defendants' declarations and conduct at the time they were identified by a witness as the men whom he saw running from the scene of the crime was admissible.—*State v. Fisher*, 211.

Same—Cross-examination—Harmless Error.

10. Though error was committed in refusing a police officer to state on cross-examination whether at the time defendants were identified by decedent at the hospital within a day or two prior to his death he seemed to be under the influence of a drug, the error was insufficient to work a reversal of the judgment where counsel made no effort thereafter to show the condition of decedent at that time.—*State v. Fisher*, 211.

Immaterial Evidence—Erroneous Admission—Harmless Error.

11. Admission of immaterial evidence, none of which reflected upon the issues, *held* harmless.—*Dewell v. Northern Pac. Ry. Co.*, 350.

Homicide—Quarrelsome Disposition of Deceased—*Res Gestae*.

12. Evidence that the person whom defendant intended to kill and subsequently killed was practically running amuck the evening of the homicide, armed with a stiletto, quarreling with and threatening other persons besides defendant, was admissible as part of the *res gestae*, as well as to show who was the aggressor and thus responsible for the killing of the person who lost his life accidentally.—*State v. Caterni*, 456.

Offer of Proof—When Rule Inapplicable.

13. The rule which requires an offer of proof to be made before refusal to admit evidence may be considered error has no application to cross-examination, nor to direct examination where the questions themselves indicate clearly the evidence intended to be elicited.—*Herzig v. Sandberg*, 538.

Cross-examination—Improper Exclusion.

14. If a question put to a witness was within the legitimate range of cross-examination, the fact that it was also proper in support of

defendant's case was no justification of the court's refusal to permit it to be asked.—*Herzig v. Sandberg*, 538.

Pleading Inconsistent Defenses—Admissibility of Evidence.

15. Since a defendant may, under section 6549, Revised Codes, interpose illogical or inconsistent defenses, it is error to exclude evidence offered in support thereof.—*St. Paul Machinery Mfg. Co. v. Bruce*, 549.

Perpetuation of Testimony—Petition—Sufficiency.

16. A petition for the perpetuation of testimony which recited that the applicant expected to be a party to an action in a district court of this state, naming the intended adverse parties and stating the nature of the controversy, the residence of the witnesses and that accounts and records in their keeping and which they were desired to bring with them, were necessary to illustrate and make understandable their testimony, *held* sufficient on supervisory control under section 8043, Revised Codes, to entitle petitioner to the order prayed for.—*State ex rel. Holcomb v. District Court*, 574.

Same—Adverse Parties—Witnesses.

17. Since an adverse party may be a witness, his testimony may be taken as provided by sections 8042 and 8043, Revised Codes.—*State ex rel. Holcomb v. District Court*, 574.

Same—Stipulations—Waiver.

18. By entering into a stipulation for a change in the time and place of taking their testimony for the purpose of perpetuation, the parties defendant to an action in which such testimony was intended to be used waived the objection that, being adverse parties, their testimony could not be taken.—*State ex rel. Holcomb v. District Court*, 574.

Erroneous Exclusion—Curing Error.

19. Error in sustaining an objection to testimony was cured by later permitting the witness to answer the same question.—*Roberts v. Oechsli*, 589.

Exclusion, When Proper.

20. Evidence which, if admissible, was a part of defendants' case in chief was properly excluded after they had rested and plaintiffs had introduced their evidence in rebuttal.—*Roberts v. Oechsli*, 589.

EXCEPTIONS.

Necessity of charging in information,—see Criminal Law, 1.

See, also, Statutes and Statutory Construction, 18.

EXECUTORS AND ADMINISTRATORS.

See, also, Probate Proceedings.

Liability for Attorney's Fees.

1. The employment and payment of counsel by an executor are matters of personal and private contract between the two; hence the former has no claim against the estate for his compensation, and if the latter does not voluntarily pay for the services, the attorney must seek redress in an ordinary action at law against him.—*State ex rel. Eisenhower v. District Court*, 172.

Allowance of Attorney's Fees—Jurisdiction.

2. An executor may reimburse himself from the funds of the estate in his charge, for money necessarily expended by him for legal services, by presenting his claim therefor for allowance; but until the attorney's fee has been actually paid, there can be no claim presented for approval, and the court is without jurisdiction to allow any amount for such expenses.—*State ex rel. Eisenhower v. District Court*, 172.

EXEMPTIONS.**Duty of Claimant.**

1. Where a debtor owns more property of a given class than the law exempts, he must, in order to secure the benefit of the exemption, identify the property he claims as exempted and segregate it from the portion liable to seizure.—*Tetrault v. Ingraham*, 524.

Waiver.

2. The right to claim property as exempt may be waived, and is waived when it is sold, since one cannot claim exemption in property which he does not own.—*Tetrault v. Ingraham*, 524.

EXPERT WITNESSES.

Physicians,—see Evidence, 1, 7.

FALSE IMPRISONMENT.

See Pleading and Practice, 7, 13.

FEEES.

Filing instruments,—see County Clerks, 1-4.

Illegal fees—Removal of officers,—see County Commissioners, 1.

FILING.

Annual statements of corporations,—see County Clerks, 1-4.

Verdicts,—see Clerk of District Court, 1.

FINDINGS.

Same—Findings—When Conclusive.

1. The finding of the district court in an adverse suit based upon evidence which is in irreconcilable conflict will not be interfered with on appeal.—*Roberts v. Oechali*, 589.

FINES.

And imprisonment—Jurisdiction of district court,—see Judgments, 3, 4.

FIXTURES.

Real and Personal Property—Rule.

1. As a general rule, the manner of an attachment to realty, the adaptability of the thing attached to the use to which the realty is applied and the intention of the one making the attachment, determine whether the thing attached is realty or personalty.—*Padden v. Murgittroyd*, 1.

FRANCHISES.

See Taxation, 7.

FRAUD.

See, also, Statute of Frauds.

Election of Remedies.

1. A person injured by the fraudulent acts of another may elect to rescind, or may affirm the transaction and sue for damages.—*Como Orchard Land Co. v. Markham*, 438.

Expression of Opinion—When Fraud.

2. An expression of opinion concerning a material matter is actionable as fraudulent if the party making it possesses superior knowledge.

such as would reasonably justify the conclusion that his opinion carries with it the implied assertion that he knows the facts which justify it, though he knows that he does not honestly entertain it, or if the opinion is so blended with facts that it amounts to a statement of facts.—*Como Orchard Land Co. v. Markham*, 438.

Representations—When Buyer may Rely upon.

3. A buyer of realty may rely upon the representations of the seller when the property sold is situated a long distance from the place where the sale is made and an investigation of the truth of the statements would entail great expense.—*Como Orchard Land Co. v. Markham*, 438.

Defense not Permissible.

4. A fraudulent seller cannot defend his actions on the ground of the buyer's credulity.—*Como Orchard Land Co. v. Markham*, 438.

Falsity of Representations—How Determined.

5. The falsity of representations as to land sold for fruit-raising purposes depended, not on whether the representations affected the quality of the land, but on whether they affected its value for the purposes for which bought.—*Como Orchard Land Co. v. Markham*, 438.

GENERAL DENIAL.

Evidence admissible under,—see *Pleading and Practice*, 17.

GIFTS.

Or donations,—see *Constitution*, 6, 15.

GRAND LARCENY.

See *Criminal Law*, 20, 21.

HABEAS CORPUS.

See, also, *District Courts*, 3, 4.

Proper Conviction — Indeterminate Sentence Act — Improper Sentence — Absolute Release not Imperative.

1. One found guilty of crime and sentenced to the state prison for a term not less than seventeen nor more than twenty years, whereas under the amended Indeterminate Sentence Act (*Laws 1917, Chap. 16, p. 16*) the minimum could not be greater—though it might be less—than one-half the maximum named in the judgment, is not for that reason entitled to his absolute discharge on writ of *habeas corpus*, but must be committed for resentence in conformity with the statute.—*In re Hughes*, 153.

HARMLESS ERROR.

See *Appeal and Error*, 3, 4; *Evidence*, 1, 4, 7, 10, 22, 26, 27, 31.

HOMICIDE.

See *Criminal Law*, 22–31, 34–36.

HUSBAND AND WIFE.

See, also, *Divorce*.

Common-law marriage,—see *Probate Proceedings*, 1.

Alimony—Summons—Service by Publication—Void Decree.

1. A decree of divorce granting alimony in a sum certain, being *in personam*, cannot be rendered upon substituted service of summons alone.—*Thrift v. Thrift*, 463.

Disposition of Husband's Realty—Void Decree.

2. Where defendant in a divorce proceeding was a resident of another state, and service of summons was had by publication, no appearance being made by him before trial, and real property owned by him was not first brought under the control of the court by proper proceedings, it was without jurisdiction to transfer to the wife absolute title to it, in addition to awarding her alimony.—*Thrift v. Thrift*, 463.

Realty—Trust—What Does not Create.

3. Though separate funds of the wife suing for a divorce, may have been employed in the improvement of lands owned by the husband, a trust or interest in the property itself is not thereby created in her favor.—*Thrift v. Thrift*, 463.

Decree—Custody of Minor—When Ineffective.

4. A divorce decree has no extraterritorial effect, and is therefore a nullity in so far as it attempts to award the custody of a minor child, residing in another state, to plaintiff residing in Montana.—*Thrift v. Thrift*, 463.

INDEBTEDNESS.

Counties—Seed Grain Act,—see Constitution, 8, 17.

INDETERMINATE SENTENCES.

See Habeas Corpus, 1.

INDICTMENTS AND INFORMATIONS.

Amendment,—see Criminal Law, 1.

Charging two offenses—Waiver,—see Criminal Law, 8.

Mayhem—Sufficiency,—see Criminal Law, 15.

Negating exception,—see Criminal Law, 2.

INDUSTRIAL ACCIDENTS.

See Workmen's Compensation.

INFANTS.**Disaffirmance of Contracts—Restoration of Consideration.**

1. An infant may disaffirm the contracts made by him (other than those mentioned in sections 3593 and 3594, Rev. Codes), during infancy or within a reasonable time after reaching majority, provided he first makes restoration of the consideration, thus placing the other party *in statu quo*.—*Stanhope v. Shambow*, 360.

Same—Restoration—Release of Surety.

2. Where an infant purchaser of an automobile disaffirmed his contract of purchase and made complete restoration by redelivering it in substantially the same condition as when he bought it, both he and his sureties were discharged from further liability.—*Stanhope v. Shambow*, 360.

Same—Notice—Sufficiency.

3. Since no particular form of disaffirmance of a contract by an infant is prescribed by section 3592, Revised Codes, a notice to the seller amounting to an unequivocal act on the infant's part of his intention to avoid the sale was sufficient.—*Stanhope v. Shambow*, 360.

Same—Restoration—What Constitutes.

4. Redelivery of an automobile at the same place at which it was sold and delivered to the buyer—which was the seller's place of business—constituted a restoration within the meaning of section 3592, author-

izing an infant to disaffirm certain contracts.—*Stanhope v. Shambow*, 360.

INJUNCTION.

Taxation—When Proper Remedy.

1. Where a portion of an assessment, made in a lump sum to plaintiff railway company, was legal and a portion illegal, and the company was unable to ascertain and pay that which was legal, the remedy by injunction to restrain the threatened issuance of a tax deed was available.—*Northern Pac. R. Co. v. County of Musselshell*, 96.

Special Assessments—Recovery Back—Limitations.

2. Assuming (but not deciding) that a special improvement assessment may be enjoined or annulled because of the act of the city council in permitting the use of material not up to specifications, attack based on such ground must be made within thirty days after passage of resolution levying the assessment.—*Leggat v. City of Butte*, 137.

INSANITY.

See Criminal Law, 16, 18, 19.

INSTRUCTIONS.

On issue of insanity,—see Criminal Law, 3, 4.

Law of Case.

1. Where no criticism was made of instructions at the time of their settlement, they become the law of the case on appeal.—*Padden v. Murgittroyd*, 1.

Street Railways—Duty of Motorman—Instructions—Proper Refusal.

2. An offered instruction that a street-car need not be stopped even at the discovery of the fright of a horse on the street, when that fright is occasioned by the usual and ordinary noises of the car, was properly refused, since street-cars (or automobiles) must be so operated as to prevent doing avoidable injury to others—stopping if and when necessary to that end.—*Anderson v. Missoula Street Ry. Co.*, 83.

Refusal—Record on Appeal.

3. An assignment of error based on the refusal of an instruction may not be considered on appeal where the instruction is not identified or presented in the manner commanded by section 6746, Revised Codes.—*Roberts v. Sinnott*, 114.

Same—Identification—Record on Appeal.

4. *Held*, that Chapter 135, Laws of 1915, providing what shall be deemed excepted to, was not designed to modify the provision of section 6746, subdivision 5, so as to do away with the necessity of identifying or authenticating in the transcript on appeal an instruction which was refused.—*Roberts v. Sinnott*, 114.

Criminal Law—Defendant may not Complain, When.

5. Of an error in instructions by which the court imposed upon the state the burden of proving both offenses charged, in order to establish one of them, defendant was not in position to complain.—*State v. Kanakaris*, 180.

Same—Credibility of Witnesses—Improper Instruction.

6. An instruction that the jury could disregard the entire testimony of any witness whom they believed to have deliberately testified falsely to any fact material to the issue, *etc.*, was erroneous under section 8028, Revised Codes, subdivision 3.—*State v. Kanakaris*, 180.

Same—Proper Refusal.

7. An instruction postulating facts not shown by the evidence and authorizing indefinite and misleading inferences was properly refused.—*State v. Sheldon*, 185.

Street Railways—Duty of Carrier—Proper Refusal.

8. In the absence of limitations therefrom to the effect that if the accumulation of snow and ice on the car-step had assumed a dangerous form, was caused in whole or in part by defendant's employees, or had existed for such a length of time that the company must have known of its presence and its dangerous character, the company was not excused from liability, an offered instruction that the mere fact of snow and ice accumulating on the step during a snowstorm was not such evidence of negligence as would warrant recovery, if defendant company had not a reasonable time to remove the effects of the storm, was properly refused.—*Garvin v. Butte Electric Ry. Co.*, 196.

Same—Duty of Carrier—Improper Instruction.

9. An offered instruction that it is the duty of a carrier of passengers to exercise a very high degree of care to clean off the steps of its cars when leaving the barn in the morning, and that it is bound to exercise ordinary care to keep the steps free from snow and ice during the day, did not meet the requirement of utmost care called for by the statute, and was properly refused.—*Garvin v. Butte Electric Ry. Co.*, 196.

Homicide—Proper Refusal.

10. Where defendants, charged with homicide, were either guilty of murder in the first degree or innocent, instructions upon murder in the second degree and upon manslaughter were properly refused.—*State v. Fisher*, 211.

Same—Reasonable Doubt—Proper Refusal.

11. The court having charged the jury in a prosecution for homicide that the state must prove beyond a reasonable doubt every material fact necessary to make out the crime charged, refusal of an instruction of the same rule in a negative form or in one applying it to an isolated fact was not error.—*State v. Powell*, 217.

Same—Inapplicability to Evidence—Proper Refusal.

12. Where, after decedent had withdrawn from a quarrel with defendant, the latter armed himself with a knife and about an hour later stabbed the former while asleep in bed, an instruction that the burden of proving that defendant was the aggressor was inapplicable and properly refused.—*State v. Powell*, 217.

Same—Justification—Improper Instruction.

13. An instruction which would have warranted the conclusion that if the state had offered any single item of evidence tending to show that defendant was justified in killing deceased, his acquittal should follow under his plea of justification, was properly refused. (Rev. Codes, sec. 9282.)—*State v. Powell*, 217.

Same—Inadequate Instructions—Request for Amplification Necessary.

14. Failure to offer an instruction amplifying one given by the court in the language of a section of the Codes, precludes defendant from complaining of the one given, unless the language used is inherently erroneous.—*State v. Powell*, 217.

Refusal—Harmless Error.

15. The admission of immaterial evidence and the giving of inapplicable instructions, none of which reflected upon the issues up for trial, were harmless.—*Dewell v. Northern Pac. Ry. Co.*, 350.

Verdict Against Law—Instructions—Disregard by Jury.

16. A verdict rendered contrary to the court's instruction is against law and will be set aside.—*Hammond v. Thompson*, 609.

INTEREST.**Jury—Discretion.**

1. The allowance of interest in an action for killing cattle on a railway track, lies within the discretion of the jury.—*Dewell v. Northern Pac. Ry. Co.*, 350.

INTOXICATING LIQUORS.

Selling to females,—see *Contempt*, 1.

INTOXICATION.

Evidence of—Admissibility,—see *Personal Injuries*, 30, 31.

JUDGES.**Liability for Judicial Acts—Rule.**

1. A judicial officer—whether of a court of general or of inferior and limited jurisdiction—cannot be held liable for damages in a civil suit for any act done by him as such—be the act grossly erroneous or even prompted by corrupt or malicious motives; provided it was done within jurisdiction of the subject matter and of the person who deems himself aggrieved by the act.—*Grant v. Williams*, 246.

JUDGMENTS.

Acquiescence in—Appeal—Estoppel,—see *Estoppel*, 1.

By default—Constructive services,—see *Jurisdiction*, 4, 5.

Dismissal of appeal,—see *Appeal and Error*, 5.

Have no extraterritorial effects,—see *Husband and Wife*, 4.

Immaterial modification—Right of appellant to complain,—see *Appeal and Error*, 30.

Judgment liens,—see *Liens*, 1.

Record on appeal,—see *Appeal and Error*, 7–16.

Default Judgment—Refusal to Set Aside—Imposition of Terms—When Improper.

1. Where defendant on the day after rendition of judgment against him by default had asked that the judgment be set aside and the cause tried on its merits, but had not applied for a continuance or leave to file an amended answer, an order imposing terms affecting these subjects as a condition precedent to the granting of the motion was unauthorized, and the defendant was at liberty to treat it as in effect denying the motion.—*J. I. Case Threshing Machine Co. v. Simpson*, 316.

Same—Complaint Insufficient—Refusal to Set Aside Error.

2. Where the complaint in an action on a promissory note did not state a cause of action, refusal to set aside a default judgment was error.—*J. I. Case Threshing Machine Co. v. Simpson*, 316.

Certiorari—Setting Aside Default—Attorneys—Stipulations—Effect.

2a. Where an order setting aside a default was made in open court by stipulation of opposing counsel the writ of *certiorari* will not issue to annul it.—*State ex rel. Wiek v. District Court*, 349.

Misdemeanors—Fines and Imprisonment—Jurisdiction.

3. *Held*, on *habeas corpus*, that the district court has the power, under section 9371, Revised Codes, to impose a sentence of imprisonment in the county jail for a certain number of days, defendant in addition to pay a fine in a stated amount, and, in default of payment, to stand committed one day for every two dollars of the fine after expiration of the term of imprisonment, until the fine is paid. In *re Londres*, 418.

Same—Fines—Mode of Collection—Imprisonment.

4. *Held*, that that portion of the judgment above providing for a term of imprisonment equal to one day for every two dollars of the fine in case of nonpayment is not a part of the judgment, but represents the common-law mode of executing the sentence, that is, of enforcing the payment of the fine.—In *re Londres*, 418.

Money Demands—Waiver.

5. Where the only relief demanded by plaintiff is a judgment subjecting attached property to the satisfaction of his claims against defendants, and not a personal judgment against any of them, he waives all rights for further relief if the proceeds of the sale of the property fail to equal in amount the aggregate of his claims.—*Strong v. Butte Central & Boston Copper Corporation*, 584.

Judgment on Pleadings—Proper Entry.

6. A mining company whose property had been sold by a trustee in bankruptcy and the sale confirmed, subject to an attachment lien in favor of plaintiff, was not in position to complain of an order sustaining his motion for judgment on the pleadings where the judgment ran only against its property and not against anyone personally.—*Strong v. Butte Central & Boston Copper Corporation*, 584.

Same.

7. Where defendant, whose demurrer to an amended complaint and motion to strike a supplemental one had been overruled, was given time within which to answer and did answer the supplemental complaint but failed to plead further to the amended one, which latter stated plaintiff's cause of action, an order for judgment on the pleadings was proper.—*Strong v. Butte Central & Boston Copper Corporation*, 584.

Same—Entry of Default.

8. The fact that default for failure to answer was never formally entered does not prevent the rendition of a valid judgment on the pleadings.—*Strong v. Butte Central & Boston Copper Corporation*, 584.

JUDICIAL NOTICE.**Attractiveness of Metals for Lightning.**

1. The natural attractiveness of metals for lightning is not one of the laws of nature of which courts may take judicial notice under section 7888, Revised Codes.—*Wiggins v. Industrial Accident Board*, 335.

JUDICIAL SALES.**Foreclosure of Mortgage—Rights of Purchaser—Subrogation.**

1. A purchaser at a judicial sale submits himself to the jurisdiction of the court and may, on proper occasion, be subrogated to whatever rights and remedies exist in favor of the judgment creditor whose claim has been satisfied by the proceeds of the sale.—*McCarthy v. State Bank of Townsend*, 319.

Same—Void Decree—Rights of Purchaser—Action for Reimbursement.

2. A purchaser of lands at a foreclosure sale under a decree which, unknown to him but known to the judgment creditor, was void be-

cause of nonservice of summons on some of the defendants, may, under section 6844, Revised Codes, as well as in the absence of statute, by independent action recover reimbursement from the judgment creditor, subrogation not offering any remedy.—*McCarthy v. State Bank of Townsend*, 319.

Same—Caveat Emptor—When Doctrine Inapplicable.

3. Where a purchaser at a foreclosure sale before bidding had consulted the decree and found a recital therein that summons had been duly served upon all defendants and in reliance thereon bought and paid for the property, he was not prevented by the doctrine of *caveat emptor* from seeking reimbursement from the judgment creditor when the decree was set aside as void for failure of service of summons upon all parties interested.—*McCarthy v. State Bank of Townsend*, 319.

Same—Laches—Mistake of Law.

4. Failure to ascertain accurately from court records that a decree in a foreclosure suit was void because of insufficient service of summons, the decree itself reciting that summons had been properly served upon all parties defendant, *held* not to have been such culpable negligence as to bar the purchaser from relief upon the ground of mistake.—*McCarthy v. State Bank of Townsend*, 319.

Personal Property—Failure of Title—Remedy.

5. Though a purchaser of real property at a judicial sale, title to which fails, has a double remedy under section 6844, Revised Codes, *vis.*, he may bring action in the nature of one for money had and received, or have the original judgment revived for his own use and benefit and proceed against the judgment debtor, a buyer of personalty is confined to the latter remedy.—*Tetrault v. Ingraham*, 524.

JURISDICTION.

See, also, District Courts; Probate Proceedings; Venue; Waiver, 1.

Removal of county commissioners,—see County Commissioners, 1.

Courts—Power to Enforce.

1. Whenever jurisdiction is conferred upon a court, all the means necessary to carry the same into effect are expressly provided by Revised Codes, section 6329, and if a court has power to make an order it has jurisdiction to enforce it.—*State ex rel. Eisenhower v. District Court*, 172.

Same—Consent cannot Confer.

2. Where the probate court is without jurisdiction to allow an expenditure, consent by the executor cannot confer it.—*State ex rel. Eisenhower v. District Court*, 172.

Justice of the Peace—Police Judge.

3. A justice of the peace has no jurisdiction over cases arising under town ordinances, except where he may have been designated, under section 3242, Revised Codes, to act as police judge, in which event failure to style himself "police judge," instead of "justice of the peace," is a mere irregularity insufficient to divest him of jurisdiction.—*Grant v. Williams*, 246.

Action in Rem—Default Judgment—Constructive Service.

4. In a suit to foreclose an attorney's lien, the record on appeal from a judgment in his favor obtained by default on constructive service of summons was silent as to the whereabouts, at the time the suit was brought, of the *res* (a dredge) to which the judgment was directed. *Held*, that the trial court was without jurisdiction to render the judgment.—*English v. Jenks*, 295.

Judgment by Default—Presumptions—Record on Appeal.

5. Upon direct appeal from a judgment by default based upon constructive service, no presumptions in favor of jurisdiction may be indulged, but the facts which show jurisdiction must appear upon the face of the record.—*English v. Jenks*, 295.

Bail Bonds—Forfeiture—Void Judgment.

6. *Held*, on *certiorari*, that while the district court may, under section 9468, Revised Codes, summarily enter judgment against the person charged with crime who fails to appear according to the condition of his bond, it exceeds its jurisdiction when it goes further than to authorize proceedings by the county attorney against the sureties by proper action, and at once enters judgment against them for the amount of the bond.—*State ex rel. Van v. District Court*, 577.

JURY.

See, also, Verdicts.

Allowance of interest,—see Interest, 1.

View of Premises—Costs.

1. The expense of taking the jury to view the premises is not taxable as costs under Revised Codes, section 7169, in the absence of a custom or rule of court authorizing it.—*Dewell v. Northern Pac. Ry. Co.*, 350.

JUSTICES OF THE PEACE.**Police Judge—Jurisdiction—Irregularities.**

1. A justice of the peace has no jurisdiction over cases arising under town ordinances, except where he may have been designated, under section 3242, Revised Codes, to act as police judge, in which event failure to style himself "police judge," instead of "justice of the peace," is a mere irregularity insufficient to divest him of jurisdiction.—*Grant v. Williams*, 246.

Malicious Prosecution—Complaint—Insufficiency—Presumptions.

2. Since a justice of the peace cannot be held liable in damages for acts done within jurisdiction, and he may have jurisdiction in an action arising under town ordinances (par. 1, *supra*), failure of plaintiff to allege that such officer had not been designated to act as police judge when he did the things charged to have constituted the malicious prosecution, damages for which were sought, was fatal to the complaint, the presumption being that official duty was regularly performed.—*Grant v. Williams*, 246.

False Imprisonment—Complaint—Insufficiency.

3. Where a town ordinance required the police judge to exact bail of those arrested and brought before him on Sundays, and upon default to remand them to jail, complaint which, *inter alia*, stated that plaintiff had been falsely imprisoned by a justice of the peace under such circumstances, *held* insufficient in the absence of an allegation designed to overcome the presumption that the justice proceeded within the authority conferred by the ordinance.—*Grant v. Williams*, 246.

LACHES.

In bringing action on promissory notes,—see Negotiable Instruments, 7.

Rule,—see Reformation of Instruments, 5.

What is not,—see Judicial Sales, 4.

LAST CLEAR CHANCE.

See Personal Injuries, 4.

LAW OF CASE.

See Instructions, 1, 16.

LICENSES.

See, also, Osteopathy; Attorney.

Itinerant Venders—Who are Not.

1. *Held*, that the representative or agent of a company or corporation which is doing business at a fixed place, who takes orders for future delivery of goods kept by his principal in connection with and handled through its fixed place of business, prices at which they are sold being fixed by it, title to the goods remaining in it, and undelivered goods to be returned to it, is not an itinerant vender, within the meaning of section 1 of Chapter 110, Laws of 1911, and therefore not required to procure the license provided for by the Act. *State v. Tuffs*, 220.

Cities and Towns — Illegal Exaction — Recovery Back — Parties *in Pari Delicto*.

2. Where city officials, quarterly for some five years, collected a sum of money from a pop-corn vender in such a manner and through such channels as of necessity to advise him that the money paid was the price of immunity from interference with the privilege of keeping his wagon on a street corner in violation of an ordinance, he was *in pari delicto* and not in position to recover back the money so paid. *Brush v. City of Helena*, 254.

LIENS.

Attorneys' liens,—see Attorneys, 1-3.

Judgment Liens—Priority of Equitable Titles.

1. The lien of a judgment is a general one, and must yield to all prior equitable title in others.—*Stockmen's National Bank v. Hofeldt*, 205.

LIGHTNING.

Death by,—see Workmen's Compensation, 1-5.

LIMITATIONS OF ACTIONS.

Action on "claim" against county,—see Counties, 3.

Waiver of statute,—see Waiver, 3.

Tax Deeds—Annulment.

1. Chapter 50, Laws of 1909, providing that no action to annul tax deeds can be maintained unless commenced within two years after their issuance has reference to valid deeds, and is therefore inapplicable to a tax deed which is void on its face.—*Lindeman v. Pinson*, 466.

Actions—Obligation not Founded on Writing.

2. An action by an executor to recover from a beneficiary under a will a succession tax required by the laws of another country which plaintiff had paid was upon an obligation not founded on an instrument in writing, and therefore barred by subdivision 3 of section 6447, Revised Codes, because not commenced within three years from the time the tax was paid.—*Tietjen v. Heberlein*, 486.

Same—Voluntary Discontinuance—New Action.

3. The provision of section 6464, Revised Codes, under which a plaintiff may, after the period of the statute of limitations has run in an action, commence a new one for the same cause as that alleged in the first, if the first was terminated in any other manner than by volun-

tary discontinuance, *held* to apply to every case wherein there has been a failure to reach a determination of the merits without plaintiff's fault and the period of limitations becomes complete during the pendency of the action.—Tietjen v. Heberlein, 486.

Same — Voluntary Discontinuance of Prior Action — New Action — Burden of Proof.

4. A plaintiff who seeks to avail himself of the benefit of the provision of section 6464, Revised Codes, and bring a new action for the same cause once sued upon by him, but which suit was discontinued and against which the statute of limitations has run, must show affirmatively that the discontinuance of the prior action was not voluntary on his part, the fact that it was dismissed "without prejudice" being without significance.—Tietjen v. Heberlein, 486.

LIVESTOCK.

Killing, by railroads,—see Railroads, 1-6.

Theft of,—see Criminal Law, 20, 21.

LOGS AND LOGGING.

See Claim and Delivery, 3.

MALICIOUS PROSECUTION.

Complaint—Insufficiency,—see Pleading and Practice, 5, 12.

MARRIAGE.

Common-law marriage,—see Probate Proceedings, 1.

See, also, Husband and Wife.

MASTER AND SERVANT.

See Personal Injuries, 1-3, 13-28, 32-34.

MAYHEM.

See Criminal Law, 15-19.

METROPOLITAN POLICE LAW.

See Cities and Towns, 11-14.

MINERAL LANDS.

See Public Lands, 1-3.

MINES AND MINING.

Mineral lands,—see Public Lands, 1-3.

Personal injuries,—see Personal Injuries, 13-21.

Taxation of mining property,—see Taxation, 1-6.

Adverse Suits—Representation Work—Immaterial Evidence.

1. In an action to determine an adverse claim to mining property on application for patent, proof that defendants had done \$500 worth of representation work upon the claim was properly excluded, such inquiry, though material before the land office, being immaterial in an adverse suit.—Roberts v. Oechsli, 589.

MINORS.

See Infants.

MISDEMEANORS.

Imposition of fine and imprisonment, jurisdiction,—see District Courts, 3, 4.

MISTAKE.

As to boundaries—Effect,—see Real Property, 6.

In description of land,—see Reformation of Instruments, 1-6.

Of law—Laches,—see Judicial Sales, 4.

MONOPOLIES.

See Osteopathy, 5.

MORTGAGES.

Conversion of mortgaged property,—see Conversion, 1-3.

Foreclosure,—see Judicial Sales.

MOTIONS.

In arrest,—see Criminal Law, 32, 33.

To strike evidence—When too late,—see Evidence, 8.

To strike allegation of complaint—Effect,—see Pleading and Practice, 14.

MURDER.

See Criminal Law, 22-31, 34-36.

NEGOTIABLE INSTRUMENTS.

Promissory Notes—Holder in Due Course.

1. *Held*, under section 5900, Revised Codes, that knowledge of a warranty that an automobile would meet certain requirements as to service did not defeat a bank's claim as a holder in due course of promissory notes taken in payment of the machine, before maturity and without being aware of a breach of such warranty.—*Baker State Bank v. Grant*, 7.

Same—Nature of Instruments.

2. By executing a negotiable promissory note, the maker is held to have intended that it may enter the channels of trade and pass from hand to hand unencumbered by any defense not known to exist when the transfer was made.—*Baker State Bank v. Grant*, 7.

Same—Complaint—Insufficiency.

3. The complaint in an action by the payee against the maker of a promissory note, which was also drawn to bearer, being fatally defective for failure to allege that the note was made, executed or delivered to plaintiff, that plaintiff was the owner or holder thereof, or that the amount due upon the indebtedness was due to plaintiff in that it could not be gathered from its recitals that the action was being prosecuted in the name of the real party in interest, refusal to set aside a judgment by default was error.—*J. I. Case Threshing Machine Co. v. Simpson*, 316.

Same—Who not Liable Thereon.

4. One whose name does not appear upon a promissory note cannot be held liable on it (Rev. Codes, sec. 5866).—*Young v. Bray*, 415.

Negotiable Instruments Law—Character of Act.

5. The provisions of the Negotiable Instruments Law (sec. 5842 *et seq.*, Rev. Codes) deal with negotiable instruments, and not with

instruments non-negotiable in character.—United States Bank v. Shupak, 542.

Demand Notes—Presentment.

6. Presentment for payment is not necessary to charge the makers of a demand note payable at a particular place.—United States Bank v. Shupak, 542.

Delay in Bringing Action—When not Defense.

7. Plaintiff's delay in bringing action on a negotiable promissory note or failure to present it for payment at an earlier date than it did was no defense so long as the action was brought within the period of the statute of limitations.—United States Bank v. Shupak, 542.

Tender of Payment—Statutes.

8. *Held*, that section 5918, Revised Codes, providing that where a note is by its terms payable at a specified place and the maker is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment by him, has no application to a demand note.—United States Bank v. Shupak, 542.

"Maturity."

9. "Maturity" of a note within the meaning of section 5918, Revised Codes, is the time when a note or bill becomes due.—United States Bank v. Shupak, 542.

Same—Date of, How not Determined.

10. Where the makers of a demand note did not keep money on deposit in a bank to meet it, but increased or diminished the deposit as the exigencies of their business permitted or required, they could not select a particular date at which their balance was sufficient to meet it and insist that the note matured at that particular time.—United States Bank v. Shupak, 542.

Banks—Agency.

11. *Held*, that section 5935, Revised Codes, providing that an instrument made payable at a bank is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon, creates the bank the agent of the maker and does not authorize it to receive payment for the holder.—United States Bank v. Shupak, 542.

Same—Collections—Duty of Agent.

12. A bank which undertakes to collect commercial paper for a customer must, in the exercise of common prudence and ordinary care, select as a subagent someone other than the party who is to make payment.—United States Bank v. Shupak, 542.

Same.

13. The above rule (paragraph 12) *held* inapplicable where the bank undertaking to collect on a note was acting for itself and the bank to which it was sent was not expected to pay it, two of its directors being the makers thereof.—United States Bank v. Shupak, 542.

Same—Payment in Money—Duty of Agent.

14. An agent has no implied authority to accept payment in anything but money.—United States Bank v. Shupak, 542.

Same—Checks—When Payment—When not.

15. A check not being money but merely an order for money its acceptance by an agent in discharge of an indebtedness is conditional upon its payment, in the absence of an agreement to the contrary.—United States Bank v. Shupak, 542.

NEW TRIAL.

Record on appeal,—see Appeal and Error, 7-16.

Secreting witness,—see Witnesses, 1.

Appeal and Error—Waiver.

1. Error in granting a new trial on a petition for letters of administration was waived by failure to appeal from the order.—*In re Riley's Estate*, 17.

Probate Proceedings—Jurisdiction—Waiver.

2. Participation by appellant in new trial proceedings, and failure to make appropriate objection in the trial court to its jurisdiction over the proceedings following the order granting a new trial, *held* to have been tantamount to a voluntary appearance and waiver of the question of jurisdiction.—*In re Riley's Estate*, 17.

Same—What is not Decision "Against Law."

3. The trial of a petition for letters of administration to the court without a jury, resulting in findings of fact warranted by the evidence, conclusions of law based upon the findings, and a judgment following both, presents no example of "a verdict or other decision" which is "against law" within the meaning of section 6794, Revised Codes, for which a new trial may be granted.—*In re Riley's Estate*, 17.

Appeal—Conflicting Evidence—Affirmance.

4. Where the evidence is in sharp conflict and the order granting a new trial is general in its terms, the order will be affirmed.—*Heavey v. Laden*, 421.

Newly Discovered Evidence—Proper Refusal.

5. Where alleged newly discovered evidence is merely cumulative, a new trial on that ground was properly refused.—*Roberts v. Oechsli*, 589.

Proper Refusal of Motion.

6. Newly discovered evidence as a ground for a motion for new trial must be evidence discovered after the trial which is material and which the moving party could not with reasonable diligence have discovered and produced at the trial, it being incumbent on such party to disclose by his own affidavit that the new evidence was not known to him at the time of the trial.—*Roberts v. Oechsli*, 589.

NONSUIT.

County Officers—Negligence—Evidence—Insufficiency.

1. Where substantially all the evidence offered by plaintiff in an action against a county board of health for negligence in looking after his welfare while a patient in the county pesthouse was excluded upon objections the ruling upon which were not questioned, leaving no evidence to show negligence or injury due to negligence on the part of the board, a judgment for nonsuit was proper.—*O'Brien v. Stromme*, 221.

Appeal and Error—Correct Result—Wrong Reason.

2. Where a nonsuit was properly granted, though upon an erroneous reason, the action of the trial court will nevertheless be affirmed.—*Barry v. Badger*, 224.

What Deemed Proved.

3. On motion for nonsuit, every fact is deemed proved which the evidence tends to prove.—*Morelli v. Twohy Bros. Co.*, 366.

When Nonsuit not to be Granted.

4. Nonsuit should not be granted if, viewed in the light most favorable to plaintiff, the evidence makes out a *prima facie* case.—*Morelli v. Twohy Bros. Co.*, 366.

Same.

5. A case should not be withdrawn from the jury unless it follows as a matter of law that recovery cannot be had upon any view of the

evidence, including the legitimate inferences to be drawn from it.—*Morelli v. Twohy Bros. Co.*, 366.

NORTHERN PACIFIC LAND GRANT.

See Public Lands, 1-3.

NOTICE.

Disaffirmance of contract by infant—Sufficiency,—see *Infants*, 3.

NUISANCES.

Abatement,—see *Attorney General*, 1, 2.

OFFER OF PROOF.

When rule inapplicable,—see *Evidence*, 13.

OFFICERS.

Negligence,—see *Nonsuit*, 1.

Police officers—Removal,—see *Cities and Towns*, 11-14.

Removal—Receiving illegal fees,—see *County Commissioners*, 1.

OSTEOPATHY.

Chiropractic—Constitution—Statutes—Defective Title.

1. *Held*, in a prosecution of a chiropractor for practicing osteopathy without first obtaining a license, that the statute under which the prosecution was had (Rev. Codes, secs. 1594-1606), is not repugnant to section 23, Article V of the State Constitution on the ground, as claimed, that there is nothing in the titles of the Acts constituting the statute regulating the practice of osteopathy indicating an intention to include "chiropractic"; the latter, like the former, having to do with the art of healing by the use of the hands, falls within the definition of "osteopathy," and must be held to have been intended as included within it.—*State v. Hopkins*, 52.

Same—Constitution—Class Legislation.

2. *Held*, further, that the provisions of the statute above are not invalid as arbitrary and unreasonable class legislation contrary to section 1 of the Fourteenth Amendment to the Constitution of the United States, guaranteeing the equal protection of the laws, the contention that the legislation permits a licensed practitioner of medicine or surgery to practice osteopathy without procuring a license, whereas it prohibits every one else from doing so, being untenable.—*State v. Hopkins*, 52.

Same—Denial of Right to Engage in Occupation.

3. The statute above (Rev. Codes, secs. 1594-1606) *held* not to make an arbitrary classification denying the right of citizens to engage in a lawful occupation, and therefore not an abuse of the police power of the state.—*State v. Hopkins*, 52.

Same—Examination—Not Unreasonable Requirement.

4. Chiropractic being osteopathy under another name, the requirement that before a chiropractor may be permitted to practice he shall be examined upon the theory and practice of osteopathy is not unreasonable.—*State v. Hopkins*, 52.

Same—Monopolies.

5. Since under the Osteopathic Practice Act anyone possessing the necessary qualifications prescribed to engage in the practice of heal-

ing by the use of the hand, whether he style himself "osteopath" or "chiropractic," may engage in the practice and earn his livelihood by this means, upon securing a license, it is not objectionable as conferring a monopoly on the school of osteopathy.—State v. Hopkins, 52.

Same—Practicing Without License—Evidence.

6. The record of the names of applicants for license, required by section 1595, Revised Codes, to be kept by the secretary of the board of osteopathic examiners, showing that defendant had never applied for a license or a temporary certificate was, in the absence of contradiction, sufficient to support the charge that he had been practicing without a license.—State v. Hopkins, 52.

Same—Information—Negating Exception.

7. An information charging one with practicing osteopathy without first obtaining a license need not allege that he had not procured a temporary certificate permitting him to practice, this being a matter of defense.—State v. Hopkins, 52.

Same—Physicians and Surgeons—License—Evidence.

8. Assuming (but not deciding) that an information charging the practice of osteopathy without a license must set forth that defendant was not a duly licensed practitioner of medicine or surgery, failure of the register of applicants to the board of medical examiners for certificate to practice required by section 1586, Revised Codes, to be kept by the board and made *prima facie* evidence of all matters therein recorded, to show that defendant had applied for license was sufficient evidence that he had not been licensed to practice medicine or surgery.—State v. Hopkins, 52.

PARTIES.

Perpetuation of testimony,—see Evidence, 17.

Secreting witness of adverse party,—see Witnesses, 1.

PARTNERSHIP.

See, also, Receivers, 4–9.

Intention to Form—Evidence—Insufficiency.

1. A partnership being a matter of agreement, express or implied, of the parties constituting it, a finding that defendants were partners, where there was nothing to show that they intended to assume those liabilities which the law attaches to a partnership, *held* unsupported by the evidence.—McCormick v. Stimson, 272.

Ostensible Partner—Insufficient Evidence.

2. Where the evidence did not show that S. permitted himself to be held out as a partner of C., or that he or the person extending the credit knew he was being represented as such, but did disclose that S.'s financial responsibility did not enter into the transaction and that credit was given to C. individually, S. could not be held as an ostensible partner of C. as defined by section 5491, Revised Codes. McCormick v. Stimson, 272.

Who Liable as Partner.

3. Unless one is a partner in fact, or an ostensible partner, he cannot be held as a partner, under Rev. Codes, section 5492.—McCormick v. Stimson, 272.

Evidence—Insufficiency—Directed Verdict—Error.

4. Evidence *held* sufficient to permit the inference of the existence of a partnership, but insufficient to command such inference, and that therefore the court erred in directing a verdict in favor of

plaintiff, who sought to hold defendants as copartners for the cost price of farming machinery.—*St. Paul Machinery Mfg. Co. v. Bruce*, 549.

Formation—Intent.

5. No one who has not held himself out as a partner is liable as such unless he is a partner in fact, and whether he is such in fact is a question of intent.—*St. Paul Machinery Mfg. Co. v. Bruce*, 549.

Presence or Absence of Term "Partnership" in Agreement—Effect.

6. Though the use of the word "partnership" in an agreement by individuals to enter into a common enterprise is not decisive, its presence or absence is evidence of considerable value in determining the relationship intended to be created.—*St. Paul Machinery Mfg. Co. v. Bruce*, 549.

Common Property—Right of Disposition.

7. Where none of the persons alleged to have constituted a farming partnership had any power to dispose of the interests of the others in the land intended to be farmed, such land could not constitute the partnership fund or common property.—*St. Paul Machinery Mfg. Co. v. Bruce*, 549.

Profit-sharing.

8. Profit-sharing is persuasive of the existence of a partnership.—*St. Paul Machinery Mfg. Co. v. Bruce*, 549.

PAYMENT.

By volunteer,—see Statute of Frauds, 3.

Worthless Check—Not Payment.

1. Giving a check which is worthless because drawn upon an insolvent bank does not pay a debt.—*United States Bank v. Shupak*, 542.

PERSONAL INJURIES.

Railroads—Master and Servant—Failure of Proof—Variance.

1. The complaint in an action against a railroad company charged that the defendant negligently, recklessly and carelessly caused and permitted the braking appliance and the chains, mechanisms and fastenings on a certain freight-car to become defective, *etc.*, and that this negligence was the proximate cause of plaintiff's injury. The evidence was that the car was equipped with hand-brakes, and that a part of the equipment was a chain connecting two parts of the mechanism, which, instead of being over a hook, was lashed to the under side of it by means of rusty baling wire, and that it was this wire which broke and caused plaintiff's fall and subsequent injury. *Held*, that, as the wire served the purpose of a connecting link between the chain and brake rod, it was fairly comprehended within the general descriptive terms employed in the complaint, and there was no failure of proof or fatal variance.—*Armitage v. Chicago, M. & St. P. Ry. Co.*, 38.

Same—Federal Safety Appliance Acts—Duty of Carrier.

2. The Federal Safety Appliance Acts, *held* to impose upon the carrier an absolute duty not only to equip its cars with the prescribed appliances, but also to maintain such appliances in a secure condition.—*Armitage v. Chicago, M. & St. P. Ry. Co.*, 38.

Same—Excessive Verdict—What is not.

3. Where it appeared from plaintiff's evidence—in sharp conflict with that of defendant—that plaintiff suffered a severe rupture, which permits the intestines to come down into the scrotum on the left side; that he sustained an injury to the back, which affected the

nerves branching off from the lower portion of the spinal column; that this injury was of such severity that there was discoloration and swelling on the back at the time of the trial, more than six months after the injury; and that as a result of such injury plaintiff has been rendered sexually impotent, is very nervous, and has lost much sleep; and that at the time of the accident he was an able-bodied man forty-one years of age, with more than twenty years' experience as a railroad man, was a brakeman and extra conductor earning \$115 a month as brakeman, had an expectancy in life of 27 years, has been unable to work since the accident, and that the injury to his nervous system is permanent, and will probably be progressive, a verdict for \$6,000, *held* not so large as to indicate passion or prejudice on the part of the jury.—*Armitage v. Chicago, M. & St. P. Ry. Co.*, 38.

Doctrine of Last Clear Chance—Prerequisites.

4. To make the doctrine of the last clear chance applicable to a personal injury case, three things must concur: The exposed condition of the person injured brought about by his negligence; the actual discovery by defendant of his perilous situation in time to avert the injury; and the failure of defendant thereafter to use ordinary care to avert it.—*Anderson v. Missoula Street Ry. Co.*, 83.

Street Railways—Horse-drawn Vehicles—Complaint—Sufficiency.

5. In an action against a street railway company for injuries to plaintiff caused by being thrown from a buggy, the horse attached to which had become unmanageable while being driven over a bridge, the gist of the complaint was that the motorman by his unnecessarily fast and noisy driving of a street-car frightened the animal and placed the occupants of the buggy in manifest danger, which danger, though increased as the car approached, the motorman disregarded. *Held*, that the pleading was sufficient as against the objection that there was no allegation of the peril of plaintiff.—*Anderson v. Missoula Street Ry. Co.*, 83.

Same—Fright of Animal—Duty of Motorman.

6. Instruction that if, as the street-car approached, the horse driven by plaintiff showed signs of becoming unmanageable, which condition was or should have been observed by the motorman, then it became his duty to slacken the speed of his car or to stop it, if necessary, in order to give plaintiff a better opportunity to control the horse, *held* proper under the pleadings and evidence.—*Anderson v. Missoula Street Ry. Co.*, 83.

Same—Allegation of Negligence—Proof of Any One Sufficient.

7. While plaintiff in a personal injury action cannot recover for negligence in any respect other than as stated in the pleadings, he is not required, where he relies on several particulars of negligence, to prove them all—proof of actionable negligence in any of the respects alleged being sufficient; hence an instruction that in order to recover, it was not necessary for plaintiff to prove that the street-car was going at a speed of twelve miles or more at the time of the accident (one of the three acts of negligence alleged), was not prejudicially erroneous.—*Anderson v. Missoula Street Ry. Co.*, 83.

Same—Duty of Motorman—Instructions—Proper Refusal.

8. An offered instruction that a street-car need not be stopped even at the discovery of the fright of a horse on the street, when that fright is occasioned by the usual and ordinary noises of the car, was properly refused, since street-cars (or automobiles) must be so operated as to prevent doing avoidable injury to others—stopping if and when necessary to that end.—*Anderson v. Missoula etc. Ry. Co.*, 83.

Same—Evidence—Sufficiency—Review.

9. If there is sufficient evidence, if credited, to sustain plaintiff's case, the supreme court will not disturb the verdict of the jury, even though the evidence, when judged from the printed record, seems to preponderate against their finding.—*Anderson v. Missoula St. Ry. Co.*, 83.

Street Railways—Snow and Ice on Car-steps—Duty of Carrier.

10. *Held*, that it may not be laid down as a matter of law that a street-car company is never required to remove snow deposited on the steps of its cars while in transit between the termini of its road during a snowstorm, and packed thereon by passengers getting on and off, but that under the statute which places upon the carrier of passengers the duty to use the utmost care and diligence for their safe carriage, and the evidence, it was for the jury to determine whether defendant should have removed the accumulation so as to avoid injury to plaintiff by slipping while in the act of alighting.—*Garvin v. Butte Electric Ry. Co.*, 196.

Same—Duty of Carrier—Instruction—Proper Refusal.

11. In the absence of limitations therefrom to the effect that if the accumulation of snow and ice on the car-step had assumed a dangerous form, was caused in whole or in part by defendant's employees, or had existed for such a length of time that the company must have known of its presence and its dangerous character, the company was not excused from liability, an offered instruction that the mere fact of snow and ice accumulating on the step during a snowstorm was not such evidence of negligence as would warrant recovery, if defendant company had not a reasonable time to remove the effects of the storm, was properly refused.—*Garvin v. Butte Electric Ry. Co.*, 196.

Same—Duty of Carrier—Improper Instruction.

12. An offered instruction that it is the duty of a carrier of passengers to exercise a very high degree of care to clean off the steps of its cars when leaving the barn in the morning, and that it is bound to exercise ordinary care to keep the steps free from snow and ice during the day, did not meet the requirement of utmost care called for by the statute, and was properly refused.—*Garvin v. Butte Electric Ry. Co.*, 196.

Master and Servant—Mine Accident—Complaint—Evidence.

13. In a personal injury action by employee against employer, the plaintiff, to be successful, must allege and prove (1) that defendant was under a legal duty to protect him from the injury complained of; (2) that he failed to perform this duty; and (3) that the injury was proximately caused by defendant's delinquency; failure to show by direct or circumstantial evidence, the presence of any one of these elements constituting the cause of action, is fatal to plaintiff's case.—*Barry v. Badger*, 224.

Same—Evidence—Insufficiency.

14. *Held*, in an action by a quartz miner to recover damages from his employer for injuries due to a fall of rock, that the evidence went no further than to show that plaintiff was in the employ of defendant and that he was injured by the fall, and was therefore under the rule *supra*, insufficient to fasten liability upon defendant because not showing any culpable omission on the part of the latter. *Barry v. Badger*, 224.

Same—Employer not Insurer—*Res Ipsa Loquitur*.

15. The employer is not an insurer of the safety of the employee, nor does the happening of the accident by which the latter is injured during the course of his employment, standing alone, furnish the

basis for an inference of culpable negligence on the part of the former, except in cases where the maxim *res ipsa loquitur* applies. *Barry v. Badger*, 224.

Master and Servant—Fellow-servant—Vice-principal.

16. Under the law of master and servant, a foreman may occupy the dual position of a fellow-servant with reference to certain work, and of the *alter ego* of the master in the doing of other acts and things, his status as either depending upon the character of his service and not upon the title he may bear.—*Morelli v. Twohy Bros. Co.*, 366.

Same—Safe-place Rule—Applicability.

17. The safe-place rule is as applicable where the working place is constantly being changed by the labor of the servant himself,—as, for instance, in tunneling work,—as in any other, the degree of care required of the master with reference to a completed place in such a case being modified to the extent that the changing conditions wrought by the servant lessen his opportunities under the rule and increase the assumed risks of the servant.—*Morelli v. Twohy Bros. Co.*, 366.

Same—Fellow-servant—Vice-principal.

18. A tunnel foreman whom plaintiff and his fellow-workmen were compelled to obey under penalty of discharge was the master's vice-principal and not a fellow-servant.—*Morelli v. Twohy Bros. Co.*, 366.

Same—Assumption of Risk.

19. Assumption of risk implies knowledge, or the means of knowledge, and appreciation of the danger on the part of the servant.—*Morelli v. Twohy Bros. Co.*, 366.

Same—Duty of Servant to Obey—Safe Place—Presumptions.

20. Where a servant is ordered from place to place in a tunnel, he must obey, and cannot stop to examine whether his working place is safe; he has a right to presume that the master has performed his duty to see that it is safe.—*Morelli v. Twohy Bros. Co.*, 366.

Same—Making Dangerous Place Safe—Assumption of Risk.

21. Plaintiff was employed both as a miner and a timberman. He was injured by a fall of rock while working in the latter capacity, after a shot had been fired, and he and his fellow-workmen excluded from the tunnel during the time the foreman undertook to make the place safe for timbering. *Held*, that he was not prevented from recovering damages under the principle that he assumed the risk of injury while making a dangerous place safe.—*Morelli v. Twohy Bros. Co.*, 366.

What Plaintiff must Show.

22. One who seeks to recover for actionable negligence must show that the defendant was under a legal duty to protect him from the injury; that the defendant failed to perform that duty; and that the injury was proximately caused by the defendant's delinquency.—*Glover v. Chicago, Mil. & St. Paul Ry. Co.*, 446.

Railroads—Master and Servant—Plaintiff Off Shift not Employee.

23. A railway telegraph operator, off shift, going neither to nor coming from work when riding on a gasoline speeder at the invitation of defendant company's roadmaster on his way to procure food supplies, choosing this mode of transportation in order to avoid paying the regular fare, was not then an employee of the company.—*Glover v. Chicago, Mil. & St. Paul Ry. Co.*, 446.

Same—Rules of Master—Customary Disregard—Knowledge.

24. If plaintiff had no knowledge of a rule of the railway company forbidding employees to ride on gasoline speeders, or the rule was

more honored in its breach than its observance, its existence could not affect his right to recover.—*Glover v. Chicago, Mil. & St. Paul Ry. Co.*, 446.

Same—Licensees—Duty Owing to.

25. Since plaintiff was injured while riding on the roadmaster's gasoline speeder, on private business, and, aside from the roadmaster's invitation, had no warrant for so riding, other than acquiescence implied from custom, he was a mere licensee, to whom the company owed no duty to keep its speeder in good condition or to operate it with caution.—*Glover v. Chicago, Mil. & St. Paul Ry. Co.*, 446.

Same—Duty Owing to Guest.

26. Assuming plaintiff to have been a guest of defendant railway company—one present on the gasoline speeder by invitation, implied as to the company and express as to the roadmaster—the duty owed him was to use reasonable care for his safety.—*Glover v. Chicago, Mil. & St. Paul Ry. Co.*, 446.

Same—Negligence—Evidence—Insufficiency.

27. Evidence held not to show that the breaking of a bolt on a gasoline speeder—the primary cause of the derailment—was due to any defect known, obvious or observable to defendants or to a failure to adequately inspect the car, and was therefore insufficient to fasten liability upon them for breach of duty owing to plaintiff, as the railway company's guest, to use reasonable care for his safety.—*Glover v. Chicago, Mil. & St. Paul Ry. Co.*, 446.

Same—*Res Ipsa Loquitur*—When Inapplicable.

28. Where the happening of an accident is not necessarily inconsistent with ordinary care, the doctrine of *res ipsa loquitur* cannot apply.—*Glover v. Chicago, Mil. & St. Paul Ry. Co.*, 446.

Automobiles—Negligence—Failure of Proof.

29. Where the evidence of defendants, charged with negligence in failing to keep a lookout for pedestrians while driving an automobile and omitting to give warning of the approach of their car, was uncontradicted that they saw plaintiff when it was a hundred feet or more from him, and plaintiff himself testified that he saw the car approaching ten or fifteen minutes before he was struck and knew it was drawing steadily nearer, the charges of negligence above referred to should have been withdrawn from the jury.—*Herzig v. Sandberg*, 538.

Same—Cross-examination—Intoxication.

30. Plaintiff having stated, among other things, that in his opinion an automobile was driven at the rate of forty miles an hour at the time it struck him, it was error to refuse permission to cross-examine him whether at that time he was intoxicated, testimony as to his condition in this respect shedding light upon his capacity for accurate observation, correct memory and unbiased judgment.—*Herzig v. Sandberg*, 538.

Same—Intoxication—Contributory Negligence.

31. Evidence of intoxication was also admissible in support of the defense of contributory negligence pleaded in the answer.—*Herzig v. Sandberg*, 538.

Master and Servant—Negligence—Evidence—Insufficiency.

32. The burden which is on him who alleges negligence to prove it by substantial evidence is not sustained by testimony which furnishes the basis for two equally permissible conclusions as to what caused the injury, one of which speaks negligence on defendant's part, while the second points to some other efficient proximate cause. *Scheytt v. Gallatin Valley Milling Co.*, 565.

Same.

33. *Held*, that a judgment for plaintiff, a roustabout in a flour-mill and connecting warehouse, who at times had also acted as foreman in the warehouse and who was injured by the fall of sacks of flour alleged to have been so negligently piled in tiers as to become out of plumb, was not sustained by his testimony, which left it in doubt whether the accident was the result of the unstable condition of the pile of sacks, or whether plaintiff carelessly pulled them down upon himself in his attempt to gain the top of the pile without the aid of a ladder.—*Scheytt v. Gallatin Valley Milling Co.*, 565.

Same—*Res Ipsa Loquitur*—Inapplicability of Doctrine.

34. In the absence of evidence showing with any degree of certainty how the accident referred to above occurred, the doctrine of *res ipsa loquitur* was not applicable.—*Scheytt v. Gallatin Valley Milling Co.*, 565.

PERSONAL PROPERTY.

See Claim and Delivery; Judicial Sales, 5; Sales; Statute of Frauds, 6-8.

PHYSICIANS AND SURGEONS.

Expert witnesses,—see Evidence, 1, 7.

See, also, Osteopathy, 8.

PLEADING AND PRACTICE.

Appellate practice,—see, also, Appeal and Error.

Judgment on pleadings,—see Judgments, 5-8.

Pleading inconsistent defenses,—see Evidence, 15.

See, also, New Trial.

Complaint—Effect of Amendment.

1. An amended complaint filed after a demurrer to the original one had been sustained and leave to amend granted, supersedes the original pleading and all issues are thereafter determinable as of the date of the commencement of the action, in the absence of supplemental pleadings.—*American Surety Co. v. Kartowitz*, 92.

Reformation of Instruments—Mistake—Complaint—Sufficiency.

2. If the complaint in a suit looking to the reformation of an instrument on the ground of mutual mistake, alleges facts which command the inference of such mistake, it sufficiently alleges mistake, unless deliberate fraud is imputed.—*Cox v. Hall*, 154.

Same—Mistake—Complaint—Inferences.

3. By alleging mutual mistake in a suit of the nature of the above, it is made apparent that plaintiff has been guilty of some degree of negligence which may or may not be excusable in the circumstances of the case.—*Cox v. Hall*, 154.

Same—Mistake—Complaint—Sufficiency.

4. Complaint which alleged in substance that plaintiff had agreed to sell, and defendant to buy, a parcel of land; that he had accurately described the land to an attorney who undertook to reduce the terms of the agreement to writing, but in doing so included more land than was intended to be conveyed; that, relying upon, and having confidence in, the attorneys integrity and ability, plaintiff failed to observe the inaccuracy, as did also defendant, or made no mention of it if observing it; and that in this faulty condition the contract was completed,—*held* sufficient to state a case for reformation on the ground of mutual mistake of the parties.—*Cox v. Hall*, 154.

Evidence—Motion to strike—When too Late.

5. Motion to strike testimony admitted without objection comes too late.—*State v. Fisher*, 211.

Malicious Prosecution—Complaint—Insufficiency—Presumptions.

5a. Since a justice of the peace cannot be held liable in damages for acts done within jurisdiction, and he may have jurisdiction in an action arising under town ordinances, failure of plaintiff to allege that such officer had not been designated to act as police judge when he did the things charged to have constituted the malicious prosecution, damages for which were sought, was fatal to the complaint, the presumption being that official duty was regularly performed.—*Grant v. Williams*, 246.

Sureties—Insufficient Complaint—Effect.

6. Where the complaint in an action against a public officer and his sureties is insufficient to state a cause of action against the former, it likewise fails to disclose liability on the part of the latter.—*Grant v. Williams*, 246.

False Imprisonment—Complaint—Insufficiency.

7. Where a town ordinance required the police judge to exact bail of those arrested and brought before him on Sundays, and upon default to remand them to jail, complaint which, *inter alia*, stated that plaintiff had been falsely imprisoned by a justice of the peace under such circumstances, *held* insufficient in the absence of an allegation designed to overcome the presumption that the justice proceeded within the authority conferred by the ordinance.—*Grant v. Williams*, 246.

Negotiable Instruments—Complaint—Insufficiency.

8. The complaint in an action by the payee against the maker of a promissory note, which was also drawn to bearer, being fatally defective for failure to allege that the note was made, executed or delivered to plaintiff, that plaintiff was the owner or holder thereof, or that the amount due upon the indebtedness was due to plaintiff in that it could not be gathered from its recitals that the action was being prosecuted in the name of the real party in interest, refusal to set aside a judgment by default was error.—*J. I. Case Threshing Machine Co. v. Simpson*, 316.

Railroads—Killing Livestock—Complaint—Negligence.

9. In an action brought under the provisions of section 4312, holding a railway company liable for cattle killed on its tracks, whether done negligently or not, for failure to keep the record book required by statute, plaintiff need not allege or prove negligence.—*Dewell v. Northern Pac. Ry. Co.*, 350.

Conversion of Mortgaged Property—Complaint—Insufficiency.

10. The complaint in an action in conversion of property upon which plaintiff held a chattel mortgage, which did not allege that she held the note to secure which the mortgage was given, that the note had not been paid, and that she had some property interest in the property converted, did not state a cause of action.—*Young v. Bray*, 415.

Promissory Notes—Complaint—Insufficiency.

11. The complaint above adverted to was further insufficient for failure to allege that plaintiff was the holder of the note at the time action was commenced.—*Young v. Bray*, 415.

Malicious Prosecution—Complaint—Insufficiency.

12. In an action for malicious prosecution, complaint which fails to state that defendant constable acted maliciously in instituting a proceeding against plaintiff in a justice court does not state a cause of action.—*Grant v. Williams*, 426.

False Imprisonment—Complaint—Insufficiency—Conclusions.

13. Complaint in an action for false imprisonment must allege that the defendant acted without warrant or other sufficient legal process, the allegation that he acted "wrongfully" and "unlawfully" not supplying a statement of facts upon which issue could be joined.—*Grant v. Williams*, 426.

Motion to Strike—Effect.

14. A motion to strike an allegation of the complaint having the effect of a demurrer, the allegation stricken will on appeal be deemed to be true.—*Como Orchard Land Co. v. Markham*, 438.

Rescission—Complaint—Contents.

15. To state a cause of action for rescission, plaintiff must allege that he has restored to the defendant everything of value which was received under the contract, or that he has offered to make restitution upon condition that defendant do likewise, unless it is made to appear that the latter is unable or positively refuses to do so.—*Como Orchard Land Co. v. Markham*, 438.

Oral Contract—Complaint—Contents.

16. The plaintiff in an action on a contract resting in parol must allege the contract upon which he seeks to recover, a substantial performance of it according to its terms, a breach by the defendant, and the facts showing the amount he is entitled to recover.—*Chealey v. Purdy*, 489.

Same—General Denials—Evidence Admissible.

17. Under a general denial in an action on an oral contract, defendant may introduce any evidence which tends to show that he did not enter into the contract, or that he made a contract different in one or more substantial particulars from that alleged, or that the plaintiff has failed to fulfill the obligations assumed by him therein according to its terms, or any other fact which tends to destroy, not to avoid, the cause of action alleged.—*Chealey v. Purdy*, 489.

Variance—What Does not Constitute.

18. A variance amounting to a failure of proof did not arise where the complaint alleged a joint contract with four defendants and the evidence disclosed a contract with only two of them.—*Chealey v. Purdy*, 489.

Complaint—Inconsistent Allegations—Effect.

19. Where allegations of the complaint are directly contrary to each other, so that proof of one would disprove the other, they are self-destructive, the court must disregard both and construe the pleading as though neither were contained therein.—*White v. Hagbery*, 593.

Counterclaim—Nature of Pleading.

20. A counterclaim must be in existence and matured for action at the time of the commencement of the suit in which it is pleaded.—*Hammond v. Thompson*, 609.

PLEDGES.

Definition.

1. The elements made essential by sections 5774 and 5775, Revised Codes, to the creation of a contract of pledge are (1) a delivery of personal property by the owner to the pledgee (2) under an agreement, express or implied, and with the intention by both parties, that the pledgee shall hold it as security for the payment of a debt or the performance of some obligation.—*Brunswick-Balke-Collender Co. v. Higgins*, 11.

What Does not Constitute.

2. Where personal property (bowling-alley and billiard-hall fixtures), bought on credit and not fully paid for, had been left by the purchaser on rented premises, and later resold by their original

owner, with the consent of the first buyer and under an agreement with the landlord that out of the amount received on the resale the latter should be paid the rent then due him from the first buyer, the goods being turned over to the new buyers for the purpose of conducting a bowling-alley business and not with any idea that they should hold them as security for the overdue rent, the transaction did not constitute a pledge as defined in paragraph 1, *supra*.—*Brunswick-Balke-Collender Co. v. Higgins*, 11.

POLICE COURTS.

See Jurisdiction, 3.

POLICE OFFICERS.

See Cities and Towns, 11-14.

PREFERENCES.

Recovery of trust funds,—see Banks and Banking, 10.

Rights of state,—see Banks and Banking, 2-5.

PRESCRIPTION.

Title by,—see Real Property, 3-6.

PRESUMPTIONS.

Ejectment—Title.

1. Plaintiff in an action in ejectment having shown legal title in himself, it will be presumed that defendant held possession of the disputed ground in subordination to such legal title.—*Rude v. Marshall*, 27.

Appeal and Error—Duty of Appellant.

2. In entering upon the consideration of an appeal, the supreme court indulges the presumption that the conclusion reached by the trial court is justified, the burden of showing that under no view of the facts disclosed will they support the judgment appealed from being on appellant.—*Dover Lumber Co. v. Whitcomb*, 141.

Judgment by Default—Jurisdiction—Record on Appeal.

3. Upon direct appeal from a judgment by default based upon constructive service, no presumptions in favor of jurisdiction may be indulged, but the facts which show jurisdiction must appear upon the face of the record.—*English v. Jenks*, 295.

Master and Servant—Safe Place to Work.

4. A servant has the right to presume that the master has performed his duty to see that the former's working place is safe.—*Morelli v. Twohy Bros. Co.*, 366.

PRINCIPAL AND AGENT.

See, also, Banks and Banking, 6, 8, 13-17.

Del Credere Commissions.

1. Where a dealer consigns goods with the understanding that title to them shall remain in him until sold and delivered by the consignee, who shall be responsible for the payment of their purchase price and return undelivered goods to the consignor, the relationship created is substantially that of principal and agent to sell upon a *del credere* commission.—*State v. Tuffs*, 20.

Agreement to Secure Against Loss.

2. A principal and his agent may agree that the former shall be secured against loss on account of sales to irresponsible parties or on account of the mistakes or dishonesty of the agent.—*State v. Tuffs*, 20.

Personal Liability of Agent—How Avoided.

3. An agent is not personally liable on a contract entered into by him on behalf of his principal if he disclosed the identity of the latter and made the engagement for him.—*Farr v. Stein*, 529.

Same—Jury Question.

4. Where the evidence of what was said and done at the time defendant, claiming to have acted as agent for another, entered into a contract, was equivocal and furnished the basis for different inferences as to what the intention of the parties was, the question whether defendant acted for himself was properly submitted for determination by a jury.—*Farr v. Stein*, 529.

PRINCIPAL AND SURETY.

Release of surety,—see *Infants*, 2.

Subrogation,—see *Banks and Banking*, 1.

Summary entry of judgment against sureties on bail bond,—see *Jurisdiction*, 6.

Insufficient Complaint—Effect.

1. Where the complaint in an action against a public officer and his sureties is insufficient to state a cause of action against the former, it likewise fails to disclose liability on the part of the latter.—*Grant v. Williams*, 246.

Contracts—Evidence.

2. In an action between the original parties to a contract, it is competent to show that the purchaser of an automobile was the principal and each of the other defendants a surety only.—*Stanhope v. Shambow*, 360.

PROBATE PROCEEDINGS.

Waiver of jurisdiction,—see *Waiver*, 1.

Letters of Administration—Husband and Wife—Common-law Marriage—Evidence—Insufficiency.

1. Where in a proceeding to obtain letters of administration it appeared that a ceremonial marriage had never taken place between petitioner and decedent, that the relations existing between the parties began when the latter had a living wife, and were therefore clandestine, and the evidence was conflicting on the question of their public assumption of the marriage relation after the death of decedent's wife, the judgment of the trial court that petitioner was not decedent's widow *held* supported by sufficient evidence.—*In re Riley's Estate*, 17.

Executors and Administrators—Liability for Attorney's Fees.

2. The employment and payment of counsel by an executor are matters of personal and private contract between the two; hence the former has no claim against the estate for his compensation, and if the latter does not voluntarily pay for the services, the attorney must seek redress in an ordinary action at law against him.—*State ex rel. Eisenhower v. District Court*, 172.

Same—Allowance of Attorney's Fees—Jurisdiction.

3. An executor may reimburse himself from the funds of the estate in his charge, for money necessarily expended by him for legal ser-

vices, by presenting his claim therefor for allowance; but until the attorney's fee has been actually paid, there can be no claim presented for approval, and the court is without jurisdiction to allow any amount for such expenses.—*State ex rel. Eisenhauer v. District Court*, 172.

Jurisdiction—Consent cannot Confer.

4. Where the probate court is without jurisdiction to allow an expenditure of the nature of that above referred to, consent by the executor cannot confer it.—*State ex rel. Eisenhauer v. District Court*, 172.

Probate Courts—Extent of Jurisdiction.

5. A district court sitting in probate has only such jurisdiction as is specially conferred or necessarily implied.—*State ex rel. Eisenhauer v. District Court*, 172.

PROCESS.

See Summons.

PROMISSORY NOTES.

See Negotiable Instruments.

PROSTITUTION.

Accepting money from and living with,—see Criminal Law, 8-13.

PUBLIC LANDS.

See, also, Attachment, 5; Assignment, 1.

Mineral Land Commission—Effect of Classification of Lands.

1. *Held*, that the determination of the mineral land commission created by the Act of Congress of February 26, 1895 (28 Stats. 683, Chap. 131), that certain lands situated within the territorial limits of the Northern Pacific land grant were nonmineral, was final and conclusive, in the absence of fraud, even though subsequent development disclosed that the classification was erroneous.—*Thomas v. Horst*, 260.

Conclusiveness of Decision of Land Department.

2. The allegation in plaintiff's complaint that patent to land, claimed by him under mineral locations and by defendant railway company as part of the land granted to it by the federal government, had issued to defendant, was tantamount to an allegation that the land had been duly classified as nonmineral under the Act of Congress of 1895 above, and the classification approved by the secretary of the interior before the mineral claims were located; hence, inasmuch as the decision of the Land Department thus made is conclusive upon the courts in the absence of fraud, and no fraud was charged, dismissal of the complaint was proper.—*Thomas v. Horst*, 260.

Mineral Land Commission—Manner of Determining Character of Land.

3. The presence of a patented quartz lode mining claim in the vicinity of the land claimed by plaintiff under mineral locations was not alone sufficient to show that the land claimed by him was also mineral; this fact could, under section 3 of the Act of 1895 above, properly be taken into consideration by the mineral land commissioners in determining the character of the land, but did not compel them to classify it as mineral.—*Thomas v. Horst*, 260.

School Lands—Sale—"Town"—Definition.

4. *Held*, that "town" within the meaning of section 1, Article XVII, of the state Constitution, prohibiting sales of school lands within

three miles of the limits of a town, is an aggregation of inhabitants and houses used for various purposes so close to one another that the inhabitants may be said to dwell together, upon a regularly platted town site, whether incorporated or not.—*Davis v. Stewart*, 429.

Same—Three-mile Limit—How Measured.

5. *Held*, that the three-mile distance from the limits of towns within which school lands cannot be sold under the inhibition of section 1, Article XVII, of the Constitution, must be measured from the nearest point upon the town-site plat.—*Davis v. Stewart*, 429.

PUBLIC SCHOOLS.

Teachers — Re-employment, — see Statutes and Statutory Construction, 2-4.

QUIETING TITLE.

Burden of proof,—see Real Property, 13.

RAILROADS.

See, also, Eminent Domain, 1; Personal Injuries, 1-3, 22-28.

Right of way — Special improvements — Assessment, — see Cities and Towns, 9, 10.

Killing Livestock—Attorney's Fee—Statute—Constitution.

1. *Held*, that section 4313, Revised Codes, allowing an attorney's fee as part of the costs of plaintiff, in case he is successful in an action against a railroad company for cattle injured or killed on its tracks, but not allowing it to the company if he is not, is a denial of the equal protection of the laws, and therefore unconstitutional.—*Dewell v. Northern Pac. Ry. Co.*, 350.

Same—Statutes—Constitution.

2. Section 4312, Revised Codes, which provides that a railroad company shall be liable to the owner of cattle killed or injured on its tracks for failure to keep the record book prescribed in section 4311, and that the court or jury "may in its or their discretion render verdict and judgment for the amount of the value of such animal," etc., is not unconstitutional as delegating law-making powers to the court or jury, i. e., to determine whether the statute shall be effective as a law of the state or not.—*Dewell v. Northern Pac. Ry. Co.*, 350.

Same—Record Book—Duty to Keep.

3. The statute imposing upon railway companies operating in the state the duty to keep a record book in which to record the dates on which animals were killed or injured, on railway tracks, their sex, brands, etc. (section 4311, Rev. Codes), is a general police regulation, analogous to one requiring fencing and cattle-guards, and as such valid.—*Dewell v. Northern Pac. Ry. Co.*, 350.

Same—Complaint—Negligence.

4. In an action brought under the provisions of section 4312, holding a railway company liable for cattle killed on its tracks, whether done negligently or not, for failure to keep the record book referred to in paragraph 3 above, plaintiff need not allege or prove negligence. *Dewell v. Northern Pac. Ry. Co.*, 350.

Same—Failure to Keep Record Book.

5. The fact that the owner of cattle killed has actual knowledge of the killing does not prevent him from invoking the provision of section 4312, Revised Codes, which imposes absolute liability for failure to keep the record book prescribed in section 4311.—*Dewell v. Northern Pac. Ry. Co.*, 350.

Same—Interest—Jury—Discretion.

6. The allowance of interest in an action for killing cattle on a railway track, lies within the discretion of the jury.—*Dewell v. Northern Pac. Ry. Co.*, 350.

REAL PROPERTY.

Warranty—Breach—Real and Personal Property—Fixtures.

1. In an action for damages for the breach of a warranty in a deed, in that a granary which was on the land when purchased had been subsequently removed by the vendor's tenant, who claimed it as his personal property, evidence *held* to show that the granary was the personal property of such tenant, and that this was known to the purchaser at the time the conveyance was made to him, both from information received by him and the manner in which it rested upon the land.—*Padden v. Murgittroyd*, 1.

Ejectment—Title—Presumptions.

2. Plaintiff in an action in ejectment having shown legal title in himself, it will be presumed that defendant held possession of the disputed ground in subordination to such legal title.—*Rude v. Marshall*, 27.

Same—Adverse Possession—Burden of Proof.

3. The burden of proof was upon defendant to show, as he claimed, that his possession as well as that of his predecessor, covering in the aggregate a period of ten years immediately prior to the commencement of plaintiff's action in ejectment, was adverse.—*Rude v. Marshall*, 27.

Same—Title by Prescription—What Constitutes.

4. Adverse possession for a period of ten years immediately prior to the commencement of an action in ejectment confers title by prescription sufficient against all.—*Rude v. Marshall*, 27.

Same—Adverse Possession—How Intention may be Manifested.

5. The erection of a fence ten feet high inclosing ground of which the person erecting it was then in possession, *held* to have been a sufficient manifestation of his intention to claim and hold the land thus inclosed as his own, declarations or assertions by the occupant not being essential to constitute the possession adverse.—*Rude v. Marshall*, 27.

Same—Adverse Possession—Boundary Lines—Mistake—Effect.

6. A mistaken belief on the part of all concerned in an action in ejectment as well as on that of their predecessors, that the line on which a fence had been erected was the true boundary line, whereas, according to plaintiff's claim, it encroached upon his property from 1.12 to 2 feet, could not, in the absence of an agreement or understanding between the adjoining owners with respect to the dividing line, destroy the claim of adverse possession; such a mistake not affecting the operation of the rule relating to the acquisition of title by prescription.—*Rude v. Marshall*, 27.

Same—*Prima Facie* Case—Sufficiency.

7. In an action seeking recovery of possession of realty claimed by defendant under title by adverse possession, evidence that plaintiff became the owner at a certain time and continued as such in possession, supplemented by the legal presumption that a thing once proved to exist continues as long as is usual with things of that nature, was sufficient, in the absence of proof to the contrary, to make a *prima facie* case in behalf of plaintiff.—*Collins v. Thode*, 405.

Same—Adverse Possession—Essentials.

8. Possession of realty, to be adverse, must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under the statute of limitations.—*Collins v. Thode*, 405.

Same—Adverse Possession.

9. Where the adverse claimant never asserted to anyone any claim to the land in question and never told the owner of it, the possession must have been of such a character as to give the owner notice of the hostile claim, else it is not "adverse."—*Collins v. Thode*, 405.

Same—Evidence—Insufficiency.

10. Evidence disclosing *inter alia* that the alleged adverse possession claimed by defendant had its inception in the possession of her son, who had moved his house upon the land and with whom she lived, but who never himself asserted any claim to the premises, made neither answer nor testified in the action, *held* insufficient to show that she ever had such possession as could ripen into title.—*Collins v. Thode*, 405.

Correction Deeds—Effect of Acceptance.

11. Where a grantee accepts and subsequently acts under a deed designed to correct a misdescription in a prior one, he elects to take whatever the correction deed calls for, and as against his grantor he surrenders all claim to what the original one described as effectually as though he had redeeded it.—*Borgeson v. Tubb*, 577.

Boundaries—Practical Location by Parties—Estoppel.

12. Evidence *held* to show such a practical location of a boundary line between adjoining city lots, and acquiescence thereafter in the line so established, as to conclude the parties and their privies.—*Borgeson v. Tubb*, 577.

Quieting Title—Burden of Proof.

13. In an action to quiet title, plaintiff must prevail upon the strength of his own case rather than upon the weakness of his adversary.—*Borgeson v. Tubb*, 577.

Title by Prescription.

14. Where defendant and his predecessors had been in actual possession of a fractional lot for over twenty-five years, it was immaterial what kind of paper title he had; unless plaintiff could show a better one, defendant was entitled to prevail in an action to quiet title.—*Borgeson v. Tubb*, 577.

RECEIVERS.

Appointment,—see Supervisory Control, 3, 4.

Excessive Compensation—Modification of Award.

1. The secretary-treasurer of a mercantile corporation was appointed receiver thereof. His compensation as secretary-treasurer had been \$4,000 per annum. His bond as receiver was paid by the trust. The net profits of the concern for the period during which he acted as receiver (ten months and eighteen days) were about \$48,000, subject to deductions for his compensation and attorneys' fees. The receivership proceedings were of a friendly nature. His duties as receiver were much the same as they had been as employee of the company, and his responsibility to the court was no greater than it had been to it. He was allowed the sum of \$20,180 as compensation for his services as receiver for the time mentioned above. *Held*, excessive, and that an allowance of \$8,000 was ample under the circumstances.—*Butte Miner Co. v. M. J. Connell Co.*, 78.

Banks—Preferences.

2. A receivership does not divest the title of the owner; hence the appointment of a receiver of a bank did not result in such a divestiture of title as to destroy the state's right of preference as against general creditors.—*Aetna Accident & Liability Co. v. Miller*, 377.

Appointment Without Notice—Purpose.

3. To justify the appointment of a receiver without notice, it must be made to appear, under section 6699, Revised Codes, that the delay resulting from giving notice would defeat the very right which plaintiff seeks to protect or imperil the property involved in the litigation.—*Masterson v. Hubbert*, 613.

Partnership—Dissolution—Improper Appointment.

4. False representations claimed to have been made by defendant at the time of the formation of the partnership which plaintiff sought to have dissolved, that he owned certain personal property and deceived plaintiff as to the rental value of the premises occupied by the parties, was not a sufficient ground for the appointment of a receiver.—*Masterson v. Hubbert*, 613.

Same.

5. A receiver should not be appointed because of quarrels or disagreements between partners, in the absence of allegation that the lack of harmony injuriously affects the business of the partnership. *Masterson v. Hubbert*, 613.

Same.

6. Appropriation by one member of a partnership of its common funds does not warrant the appointment of a receiver, where it is not made to appear that the funds will ultimately be lost and that defendant is insolvent.—*Masterson v. Hubbert*, 613.

Same—Partnership—Purpose of Appointment.

7. The purpose of appointing a receiver as ancillary relief in an action for the dissolution of a partnership is to prevent the member at fault dissipating the common property and thereby defeating the object of the suit.—*Masterson v. Hubbert*, 613.

Same—How Power of Appointment to be Exercised.

8. The power to appoint a receiver should be exercised sparingly, with extreme caution, and only to prevent manifest wrong immediately impending, or in case it is made to appear clearly that plaintiff is in danger of suffering irreparable injury and there is no other plain, speedy or adequate remedy available.—*Masterson v. Hubbert*, 613.

Same—Improper Appointment.

9. Where a partnership was prosperous, had no debts and plaintiffs were not ousted or denied participation in the management and control of the business, the appointment of a receiver without notice pending settlement of a dissolution suit was improper, the only substantial ground alleged being that plaintiffs were not receiving their full share of the partnership profits and that certain funds were being misappropriated by defendant.—*Masterson v. Hubbert*, 613.

RECORD ON APPEAL.

See Appeal and Error, 7-16, 23, 25.

REFORMATION OF INSTRUMENTS.**Mistake—Complaint—Sufficiency.**

1. If the complaint in a suit looking to the reformation of an instrument on the ground of mutual mistake, alleges facts which command the inference of such mistake, it sufficiently alleges mistake, unless deliberate fraud is imputed.—*Cox v. Hall*, 154.

Same—Complaint—Inferences.

2. By alleging mutual mistake in a suit of the nature of the above, it is made apparent that plaintiff has been guilty of some degree of negligence which may or may not be excusable in the circumstances of the case.—Cox v. Hall, 154.

Same—Complaint—Sufficiency.

3. Complaint which alleged in substance that plaintiff had agreed to sell, and defendant to buy, a parcel of land; that he had accurately described the land to an attorney who undertook to reduce the terms of the agreement to writing, but in doing so included more land than was intended to be conveyed; that, relying upon, and having confidence in, the attorney's integrity and ability, plaintiff failed to observe the inaccuracy, as did also defendant, or made no mention of it if observing it; and that in this faulty condition the contract was completed,—*held* sufficient to state a case for reformation on the ground of mutual mistake of the parties.—Cox v. Hall, 154.

Same—Findings—Conformity to Issues.

4. Under the general allegation of mistake, a finding that plaintiff was a man of meager education, familiar with neither land surveys nor technical or legal descriptions of land, and unable to detect errors in such descriptions, was germane to the issues, and thus supported by the pleadings.—Cox v. Hall, 154.

Laches—Rule.

5. Where it appeared that, though plaintiff was given to understand that defendant would consent to the correction of the deed sought to be reformed, he was not definitely advised that correction would be refused until about eighteen months before commencing suit, and thereafter used reasonable diligence to bring his cause up for adjudication but was delayed by circumstances beyond his control, he was not barred from recovery by laches; the rule being that laches short of the period of limitations will not bar relief, unless unusual circumstances are affirmatively shown rendering relief inequitable.—Cox v. Hall, 154.

Description of Land—"More or Less."

6. The fact that the conveyance contained the recital that a given number of acres "more or less" was thereby transferred did not render reformation inequitable, since that expression is designed to cover small excesses or deficiencies in the acreage of a particular tract sold as such, but not to include something (21.33 acres, in this instance) which it never was the intention of the parties to include.—Cox v. Hall, 154.

REPLEVIN.

See Claim and Delivery.

RESCISSION.

Complaint—Contents,—see Pleading and Practice, 15.

Fraud—Election to rescind,—see Fraud, 1.

RES IPSA LOQUITUR.

See Personal Injuries, 15, 28, 34.

ROADS.

Compensation for land taken for,—see Counties, 3, 4.

RULES.

Of employer—Customary disregard—Effect,—see Personal Injuries, 24.

SAFETY APPLIANCES.

See Personal Injuries, 2.

SALES.

See, also, Claim and Delivery, 3-5; Judicial Sales; Statute of Frauds.

Failure of Consideration — Breaches of Warranty — Availability of Defenses.

1. The rules that failure of consideration cannot be raised by one who accepts and retains property sold, and that breaches of warranty after acceptance cannot be urged as a defense but only as counterclaims, apply only where the acceptance was unqualified or unconditional.—*St. Paul Machinery Mfg. Co. v. Bruce*, 549.

SCHOOL LANDS.

Sale,—see Public Lands, 4, 5.

SCHOOLS.

County high schools—Bonds—Validity,—see Counties, 1, 2.

See, also, Public Schools; School Lands.

SEED GRAIN ACT.

Constitutionality,—see Statutes and Statutory Construction, 11-16.

SPECIAL IMPROVEMENT DISTRICTS.

See Cities and Towns, 1-10.

STATE.

Insolvent banks—Deposits—Preference,—see Banks and Banking, 1-4.

Statutes—Diminishing Powers—Construction.

1. The state is not bound by the general language of a statute which tends to restrain or diminish its powers, rights or interests.—*Aetna Accident & Liability Co. v. Miller*, 377.

STATUTE OF FRAUDS.

Evidence—Sufficiency.

1. In an action against a decedent's estate to recover amounts advanced on account of a corporation, evidence *held* to justify a finding that decedent and plaintiff, while directors and stockholders of the company, before disbursement of any funds, orally agreed that they would finance the company and personally advance funds to meet its obligations, and that, if either failed to obtain reimbursement from the company, there should be an accounting between them, each promising to pay a half of the sums advanced; *held* further, that the agreement was on its face one within the statute of frauds, because oral.—*Bennighoff v. Robbins*, 66.

Primary and Collateral Obligation.

2. Plaintiff's advances having been noted upon the company's books as its liability, and it formally executing to him a note, which, whether intended as a liquidation or not, operated as an acknowledgment and acceptance of what he had done in advancing funds, there was a primary obligation between plaintiff and the company, to which the agreement between plaintiff and decedent was collateral. *Bennighoff v. Robbins*, 66.

Payment by Volunteer.

3. Under the circumstances noted above, and the further one that plaintiff was looked to to keep the company on its feet, payments made by him were not those of a mere volunteer, for which it was not liable.—Bennighoff v. Robbins, 66.

Obligation Must be Legal, not Moral.

4. The consideration which, under section 5660, subdivision 3, will convert a promise to answer for the obligation of a third person into an original obligation of the promisor, so as to take it out of the statute of frauds, must be one tangible at law—a legal, pecuniary benefit, rather than a moral obligation.—Bennighoff v. Robbins, 66.

Taking Promise Out of Statute—Exclusive Credit to Promisor.

5. Where two directors of a corporation in need of financial aid orally agreed with each other that each would answer to the other for advances made by each to it, provided things could not be so arranged that both should be made whole by the corporation, neither became a principal debtor to the other and the agreement was not taken out of the statute of frauds (sec. 5660, subd. 2, Rev. Codes), since credit was not given to the promisor exclusively.—Bennighoff v. Robbins, 66.

Sales—Change of Possession.

6. The statute of frauds (Rev. Codes, sec. 6128) requiring the surrender of control by the vendor and assumption of possession by the vendee of personal property, which is the subject of a sale is satisfied whenever there has been such actual change of dominion over the thing sold as is practically consistent with its nature, extent and intended use, viewed in the light of the character of the transaction and the situation of the parties at the time.—Dover Lumber Co. v. Whitcomb, 141.

Same—Delivery—Evidence of Change of Possession.

7. The delivery of a thing sold may be symbolical as well as actual, and the identification of the property in the hands of the new owner, by the means usually employed for such purpose, is generally sufficient evidence of a change of possession.—Dover Lumber Co. v. Whitcomb, 141.

Same—Passing of Title—Rule.

8. The rule that title to personal property does not pass to the buyer if anything remains to be done by the seller refers to something necessary to determine the quantity, quality or identity of the thing sold, or to something necessary to put the article in the condition contemplated by the contract of sale.—Dover Lumber Co. v. Whitcomb, 141.

Extent of Title of Vendee.

9. Where there has been a sale of personal property not accompanied by an immediate delivery and followed by an actual and continued change of possession, the vendee takes title subject to the claim of the vendor's creditor.—Tetrault v. Ingraham, 524.

STATUTE OF LIMITATIONS.

See Limitations of Actions.

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STATUTES AND STATUTORY CONSTRUCTION.

See, also, Constitution.

Class legislation,—See Osteopathy, 2.

Defective title,—see Osteopathy, 1.

Penal Statutes—Construction.

1. The provisions of a statute which is penal in character are not to be extended by implication.—*State v. Tuffs*, 20.

Statutes—Retroactive Effect—Rule.

2. Retroactive effect is not to be given to a statute unless commanded by its context, terms or manifest purpose.—*Falligan v. School District No. 1*, 177.

Public Schools—Teachers—Re-employment—School Code—Retroactive Effect not Permissible.

3. *Held*, under the above rule, that where a teacher was re-employed for the second time before the enactment of the General School Code (Laws 1913, Chap. 76), section 801 of which (p. 244) provides for an automatic renewal of the contract of employment after election for the second consecutive year, *etc.*, but does not command that a retroactive effect shall be given its provisions, the court properly sustained a general demurrer to her complaint in an action against the school board for breach of contract.—*Falligan v. School District No. 1*, 177.

Same—School Code—Automatic Renewal of Contract of Employment.

4. *Quaere*: Are the provisions of section 801, *supra*, available to principals and teachers whose two-year period of employment antedates, but whose re-engagement occurred after, the passage of Chapter 76, Laws of 1913?—*Falligan v. School District No. 1*, 177.

Statutes—Liberal Construction—When not to be Indulged.

5. Where no work has been done under contracts for the installation of a special improvement, or warrants issued, the claim that a liberal and indulgent view of faulty proceedings in creating the district should be taken has no merit.—*Cooper v. City of Bozeman*, 277.

Curative Statutes—When Ineffective.

6. The legislature has not the power, by curative statute, to make effective proceedings for the creation of a special improvement district which were void from their inception.—*Cooper v. City of Bozeman*, 277.

Statutes—Partial Invalidity—Rule.

7. Where, after eliminating a portion of an Act which is invalid, the remainder is complete in itself and capable of being executed in accordance with the apparent legislative intent, and the approval of the invalid portion was not an inducement to the enactment of those remaining, the statute thus remaining must be upheld.—*Hamilton v. Board of County Commissioners*, 301.

Statutes—Amendment—Effect.

8. Where the legislature declares that an existing statute is amended "to read as follows," the new Act takes the place of the old one exclusively, all portions of the original statute omitted from the amended one being repealed.—*State ex rel. Paige v. District Court*, 332.

Void Statute not a Law.

9. A void statute is not a law, imposes no duty, confers no authority, affords no protection, and no one is bound to observe it.—*Hamilton v. Board of County Commissioners*, 301.

State Statutes—Diminishing Powers—Construction.

10. The state is not bound by the general language of a statute which tends to restrain or diminish its powers, rights or interests.—*Aetna Accident & Liability Co. v. Miller*, 377.

Statutes—Constitutionality—Duty of Courts.

11. Where a statute is assailed as unconstitutional, the question is not whether it is possible to condemn but whether it is possible to uphold; hence it will not be declared unconstitutional unless its nullity is placed beyond reasonable doubt.—*State ex rel. Cryderman v. Wienrich*, 390.

Seed Grain Law—Taxation—Public Purpose.

12. *Held*, that the seed grain law (Chap. 13, Laws 1915), designed to furnish aid to persons engaged in agriculture who, because so reduced in circumstances by natural or other conditions beyond their control, that they have no means wherewith to purchase seed, is not in contravention of section 11, Article XII, forbidding taxation, for other than public purposes.—*State ex rel. Cryderman v. Wienrich*, 390.

Same—Provisions of Act—For Whose Benefit.

13. The benefits of the seed grain law above, *held* to be intended as much for farmers who do not own land, *i. e.*, homesteaders and renters, as for those who do.—*State ex rel. Cryderman v. Wienrich*, 390.

Same—Destitute Farmers—Counties—Loaning Credit—Constitution.

14. Construing section 1, Article XIII, Constitution, forbidding counties from giving or loaning their credit in aid of, or making any donation to, an individual, with section 5, Article X, making it the duty of the counties to provide for those inhabitants who by reason of misfortune may have claims upon the aid of society, the seed grain law does not offend against section 1, *supra*.—*State ex rel. Cryderman v. Wienrich*, 390.

Same—Constitution—Appropriation—Public Funds.

15. Section 35, Article V, prohibiting appropriations by the legislature for benevolent purposes, does not affect Chapter 13, *supra*, since the legislature made no appropriation for the purposes sought to be served by the Act.—*State ex rel. Cryderman v. Wienrich*, 390.

Same—Counties—Incurring Indebtedness—Special Election.

16. Chapter 13, Laws of 1915, *held* inoperative in any case in which the indebtedness sought to be created by a county bond issue is in excess of \$10,000, upon a mere petition, section 5, Article XIII, of the Constitution prohibiting the incurring of indebtedness beyond the sum of \$10,000 without the approval of the qualified electors, and no provision for such an election having been made.—*State ex rel. Cryderman v. Wienrich*, 390.

Statutes—Constitutionality—How Determined.

17. No Act of the legislature will be pronounced unlawful unless its nullity is made manifest beyond a reasonable doubt.—*State ex rel. Campbell v. Stewart*, 504.

Statutory Construction—Exceptions.

18. Where it is apparent that the legislature intended to make an exception to a general statutory provision, the words must be so construed even though not expressed technically in the form of an exception.—*State ex rel. Interstate L. Co. v. District Court*, 597.

STIPULATIONS.

Binding on parties,—see *Certiorari*, 1; Evidence, 18.

Statute of Limitations—Waiver.

1. The defense of the statute of limitations may be waived by stipulation, and if so waived, the agreement will not be set aside on the

ground that it was entered into under a mistake as to the law.—*Dewell v. Northern Pac. Ry. Co.*, 350.

STREET RAILWAYS.

See Personal Injuries, 4-12.

SUBROGATION.

When not Applicable.

1. Subrogation may be asserted or waived by the party entitled to its benefit, but is not intended to be applied in all cases, as where it would be of no advantage, where justice does not demand its application, where it would prejudice the rights of innocent parties, where its effect would be to compel the acceptance of a doubtful or inadequate remedy for one which would be more certain or adequate. *McCarthy v. State Bank of Townsend*, 319.

Rights of Subrogee.

2. A subrogee cannot, as such, acquire any other or greater rights than those possessed by the party whom he disposes.—*McCarthy v. State Bank of Townsend*, 319.

Judicial Sale—Rights of Purchaser.

1. A purchaser at a judicial sale submits himself to the jurisdiction of the court and may, on proper occasion, be subrogated to whatever rights and remedies exist in favor of the judgment creditor whose claim has been satisfied by the proceeds of the sale.—*McCarthy v. State Bank of Townsend*, 319.

Insolvent Banks—Deposits—Suretyship.

4. Where deposits of state funds are secured by a bond and the surety is compelled to pay the amount thereof upon failure of the bank, the right of the state, if existent and not lost in some way, passes by subrogation to the surety.—*Aetna Accident & Liability Co. v. Miller*, 377.

SUMMONS.

See, also, Husband and Wife, 1, 2.

Actions *in Rem*—Constructive Service.

1. Constructive service is effectual only in actions strictly *in rem*, in actions affecting plaintiff's personal status, and in actions to recover on money demands where and to the extent that some lien brings property into court as a *res* to answer for the judgment which may be entered.—*English v. Jenks*, 295.

SUPERVISORY CONTROL.

See, also, Contempt, 1; Evidence, 16; Venue, 3.

Appeal Adequate—Denial of Writ.

1. The writ of supervisory control will not issue to review a palpably erroneous order of the district court declining to set aside a default divorce decree, where the remedy by appeal is adequate and the time for taking it has not expired.—*State ex rel. Topley v. District Court*, 461.

Nature of Writ.

2. The writ of supervisory control issues to prevent a failure of justice, by supplying a means for the correction of manifest error committed by the trial court within jurisdiction, where there is no other adequate remedy and gross injustice is threatened.—*State ex rel. Hubbert v. District Court*, 472.

Receivers—Appeal Adequate Remedy.

3. Since under section 7099, Revised Codes, an order appointing a receiver is appealable, and such an appeal will present the question whether the district court committed error in denying a motion to annul the order of appointment, supervisory control does not lie to review the latter order.—*State ex rel. Hubbert v. District Court*, 472.

Same—Appeal Speedy Remedy.

4. Under the rules of the supreme court, an appeal from an order appointing a receiver is entitled to advancement; hence, the remedy by appeal is not only adequate (par. 2, above), but also speedy.—*State ex rel. Hubbert v. District Court*, 472.

SURETYSHIP.

See Principal and Surety.

TAXATION.

Assessment for special improvements,—see *Cities and Towns*, 1-10.

County high school purposes,—see *Counties*, 2.

Public purpose,—see *Constitution*, 5.

Mining Property—Constitution—"Mine"—What Constitutes.

1. *Held*, that the expression "all mines" in the last clause of section 3, Article XII, of the state Constitution, providing that among other things the net proceeds thereof shall be taxed, was intended to apply to all mineral deposits—both those found in lands purchased from the United States under the mining laws, and those obtained by grant or purchase under other laws.—*Northern Pacific Ry. Co. v. County of Musselshell*, 96.

Deeds—Reservations—Coal in Place—Not Taxable.

2. Coal in place, found in lands granted by the government to the Northern Pacific Railway Company, which coal the company reserved to itself in deeds to portions thereof sold by it, constitutes a mine, and as such, in its undeveloped condition, is not a proper subject for taxation.—*Northern Pacific Ry. Co. v. County of Musselshell*, 96.

Same—Reservations—Surface Rights Taxable.

3. The right, also reserved in deeds referred to above, to such use of the surface of the land as may be necessary for the exploration, mining and carrying away of the coal that may be found below, is a valuable interest in the land itself and as such properly subject to taxation.—*Northern Pacific Ry. Co. v. County of Musselshell*, 96.

Same—Surface Rights—Taxable Value—How Ascertained.

4. The taxable value of the right to the use of the surface of the land for the purposes referred to in paragraph 3, *supra*, omitting the deposit from the estimate, is to be ascertained as if the entire estate, i. e., the land and the reservations, was vested in the grantee, the assessor to make an equitable apportionment of this value between the grantee and the railway company.—*Northern Pacific Ry. Co. v. County of Musselshell*, 96.

Same—Tax Deeds—Injunction—When Proper Remedy.

5. Where a portion of an assessment made in a lump sum to plaintiff railway company, was legal and a portion illegal, and the company was unable to ascertain and pay that which was legal, the remedy by injunction to restrain the threatened issuance of a tax deed was available to it.—*Northern Pacific Ry. Co. v. County of Musselshell*, 96.

Same—Mines and Mining Claims—Taxable Values.

6. The purchase price of mines or mining claims acquired from the United States is the standard of value for taxation purposes (aside from the annual net proceeds, value of machinery and improvements), unless the surface is used and has a value for other purposes, in which event the latter is the taxable value; if not purchased from the United States, the taxable value is the value of the surface considered as real estate, without reference to mineral content below the surface.—*Northern Pacific Ry. Co. v. County of Musselshell*, 96.

Corporations—"Franchise"—When Taxable.

7. *Held*, that the franchise which is made taxable by the Constitution is not the bare right conferred upon corporations to do business in the state, but that special privilege, not enjoyed by citizens generally, which represents something out of which the tax may be realized by forced sale, if necessary, as, for instance, the franchise of street railway, telephone and telegraph, gas and water companies; hence the franchise of an express company under which it enjoys no such special privilege is not subject to taxation.—*Wells Fargo & Co. v. Harrington*, 235.

Assessment to "Estate" of Decedent—Validity.

8. An assessment to the "estate" of a deceased person is tantamount to an assessment to his heirs, guardians of his heirs, executors of his will or administrators of his estate, as the case may be, if they have actual notice of it.—*Hill v. Lewis and Clark County*, 479.

Same—Concealed Property—Assessment on Discovery—Validity.

9. Where, after the assessment-roll had passed out of the assessor's hands and the county board of equalization had adjourned, that officer discovered, listed for assessment, and assessed under the authority of section 2542, Revised Codes, personal property belonging to the undistributed estate of a deceased person, the fact that the executors in charge of it were thus deprived of a right of appeal to the board of equalization did not invalidate the additional assessment, since the property was taxable, and appeal to the board is available, not to him who has concealed property, but who has delivered to the assessor a sworn statement of all his taxable property. (Sec. 2743.)—*Hill v. Lewis and Clark County*, 479.

TAX DEEDS.**City lots—Sale *en Masse*—Invalidity.**

1. A tax deed showing on its face that a large number of lots situated in twenty-one different blocks, in an addition to a city, had been sold *en masse*, was void.—*Lindeman v. Pinson*, 466.

Limitations—Statutes.

3. Chapter 50, Laws of 1909, providing that no action to annul tax deeds can be maintained unless commenced within two years after their issuance has reference to valid deeds, and is therefore inapplicable to a tax deed which is void on its face.—*Lindeman v. Pinson*, 466.

TEACHERS.

Re-employment,—see *Statutes and Statutory Construction*, 2-4.

TENDER.

Of payment of promissory note—Statutory rule—Inapplicable to demand note,—see *Negotiable Instruments*, 8.

When unnecessary,—see *Claim and Delivery*, 5.

TITLE.

Equitable—Priority,—see Liens, 1.
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TORTS.

Actions on,—see Venue, 1.
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TRUSTS.

Trust funds—Recovery back,—see Banks and Banking, 6.

VARIANCE.

See Personal Injuries, 1; Pleading and Practice, 18.

VENUE.

May be established by circumstantial evidence,—see Criminal Law, 21.

Actions on Contracts—Statutes and Statutory Construction.

1. Under the rule of statutory construction requiring every word, clause and sentence of a statute to be given effect, if possible, to the end that the different provisions thereof may be made consistent and harmonious and each assigned an intelligent meaning, *held*, that the last sentence of section 6504, Revised Codes, should be read to mean that actions upon contracts *must* (not *may*) be tried in the county in which the contract was to be performed, and actions for torts in the county where the tort was committed.—State ex rel. Interstate Lumber Co. v. District Court, 597.

Motion for Change—When to be Made.

2. A motion for a change of venue on the ground that the action was not commenced in the proper county must under section 6505, Revised Codes, be made by defendant upon his first appearance.—State ex rel. Interstate Lumber Co. v. District Court, 597.

Same—Supervisory Control—Writ Lies, When.

3. In the absence of an appeal from an order directing the erroneous transfer of a cause to another county for trial on motion of defendant, and neither *mandamus*, *certiorari*, nor prohibition being available, supervisory control lies to review the order.—State ex rel. Interstate Lumber Co. v. District Court, 597.

VERDICTS.

Contrary to instructions,—see Instructions, 16.

Defective—Power of courts,—see Criminal Law, 3.

Excessive,—see Personal Injuries, 3.

Filing imperfect verdict,—see Criminal Law, 4.

Claim and Delivery—Verdict—Insufficiency.

1. Failure of the verdict in an action in claim and delivery to find that defendant wrongfully took and detained the property in question renders it insufficient to sustain a judgment in plaintiff's favor and amounts to a mistrial.—Olcott v. Gebo, 35.

Counterclaims—Unjustifiable Verdict.

2. - Where, in an action on a promissory note, the total of defendant's counterclaims could not be made to equal the amount admittedly due plaintiff, a verdict in favor of the former was unjustifiable.—*Murray v. Haldorn*, 125.

Directed Verdict—When Proper.

3. In a case tried by a jury where the evidence is undisputed and furnishes the basis for but one reasonable conclusion, the only question for determination is one of law, and the court may direct a verdict in favor of the party entitled to it.—*Old Kentucky Distillery v. Stromberg-Mullins Co.*, 285.

Same—Question Determinable on Appeal.

4. The question on appeal from a judgment based on a directed verdict is not whether the inferences necessary to maintain the court's action are permissible from the evidence, but whether they are commanded by it.—*St. Paul Machinery Mfg. Co. v. Bruce*, 549.

WAIVER.

Information charging two offenses,—see *Criminal Law*, 8.

See, also, *Evidence*, 18; *Judgments*, 5; *New Trial*, 1.

Probate Proceedings—Jurisdiction.

1. Participation by appellant in new trial proceedings and failure to make appropriate objection in the trial court to its jurisdiction over the proceedings following the order granting the new trial, held to have been tantamount to a voluntary appearance and waiver of the question of jurisdiction.—*In re Riley's Estate*, 17.

Attorney's Lien—What Does not Constitute Waiver.

2. Under Revised Codes, section 6422, an attorney's lien extends to the proceeds of the judgment, "in whosever hands they may come"; so that the mere fact that the judgment debtor's property was bought in under execution by plaintiff, and thus became the proceeds of the judgment obtained by him for his client, and took the place thereof, did not constitute a waiver of his lien.—*English v. Jenks*, 295.

Statute of Limitations—Stipulation.

3. The defense of the statute of limitations may be waived by stipulation, and if so waived, the agreement will not be set aside on the ground that it was entered into under a mistake as to the law.—*Dewell v. Northern Pac. Ry. Co.*, 350.

States—Prerogative Rights.

4. No right of the state can be waived by any power short of that of the state; therefore the prerogative right of the state to a preference was not defeated by an assignment of its claim to the surety, through the instrumentality of a ministerial officer.—*Aetna Accident & Liability Co. v. Miller*, 377.

Conversion—Waiver of Tort—*Assumpsit*.

5. One whose property has been wrongfully converted may waive the tort and sue in *assumpsit*, in which event the measure of damages is the value of the property at the date of the conversion, not to exceed the amount due plaintiff; hence the complaint must allege such value.—*Young v. Bray*, 415.

Personal Property—Exemptions.

6. The right to claim property as exempt may be waived and is waived when it is sold.—*Tetrault v. Ingraham*, 524.

WAR DEFENSE ACT.

Constitutionality,—see Constitution, 12-17.

WARRANTY.

Breach,—see Real Property, 1; Negotiable Instruments, 1.

Breach—Availability of defense,—see Sales, 1.

WATER RIGHTS.

Right of Appeal—Estoppel by Acquiescence in Decree.

1. *Held*, that plaintiffs in a water right suit estopped themselves from prosecuting an appeal from the decree in the provisions of which they acquiesced during the entire irrigating season following its entry by consenting to the appointment of a water commissioner to apportion the water of the stream in controversy as decreed, by contributing to the payment of his compensation, by prosecuting such officer for contempt, as well as by soliciting the appointment of a new commissioner for the second season following rendition of the decree.—*Richli v. Missoula T. & S. Bank*, 127.

WHITE SLAVERY.

See Criminal Law, 8-13.

WITNESSES.

Credibility—Improper instruction,—see Instructions, 6.

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Improper leading questions,—see Criminal Law, 10.

Perpetuation of testimony,—see Evidence, 16-18.

Parties—Secreting Witnesses of Adversary—Contempt—Misdemeanor—New Trial.

1. The action of a party in secreting and forcibly keeping in hiding a witness of his adversary until the trial was concluded, and thus suppressing material testimony, constituted contempt, a misdemeanor and misconduct or irregularity for which a new trial should be granted. *Buntin v. Chicago, M. & St. P. Ry. Co.*, 495.

WORKMEN'S COMPENSATION.

Burden of Proof.

1. He who claims compensation under the Workmen's Compensation Act (Laws 1915, Chap. 96) has the burden of establishing, by a preponderance of the evidence, that the injury or death resulted from (1) an industrial accident (2) arising out of and (3) in the course of the employment.—*Wiggins v. Industrial Accident Board*, 335.

Death by Lightning—Act of God.

2. The Workmen's Compensation Act (Laws 1915, Chap. 96), is sufficiently comprehensive to include death due to a stroke of lightning while deceased was doing county road work with a grader made of steel and iron.—*Wiggins v. Industrial Accident Board*, 335.

Same—Accident "Arising Out of Employment"—Definition.

3. An injury to a workman arises "out of" his employment, within the meaning of the Compensation Act above, if it is the result of exposure to a hazard peculiar to the employment, or of exposure to more than the normal risk to which the people of the community generally are subject.—*Wiggins v. Industrial Accident Board*, 335.

Same—Attractiveness of Metals for Lightning—Judicial Notice.

4. The natural attractiveness of metals for lightning is not one of the laws of nature of which courts may take judicial notice under section 7888, Revised Codes.—Wiggins v. Industrial Accident Board, 335.

Same—Not Industrial Accident.

5. *Held*, that the death of a county employee who, while working on a road grader made of steel, was killed by lightning, did not result from an accident arising "out of" his employment, within the meaning of the Workmen's Compensation Act, since the hazard of being struck cannot be said to have been increased by the presence of the grader. Wiggins v. Industrial Accident Board, 335.

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